

**THE DEVELOPMENT OF A COMMERCIAL LAW STRUCTURE IN THE SADC WITH
SPECIFIC REFERENCE TO OHADA**

By

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SUMMARY OF THESIS

In a region where there is diversity of laws, the author maintains that law reform is a catalyst for investment and development. This thesis aims at demonstrating that OHADA provides practical lessons for the development of a uniform commercial law structure in the SADC. This is following OHADA's success in developing uniform commercial rules that are directly applicable in the contracting states. To achieve this, the thesis uses a "structured focused comparison" methodology that allows for two separate, but structurally linked accounts of the structures of both organisations. In exploring the structures of both organisations, the thesis endeavours to: determine whether there is the need for the development of a commercial law structure in the SADC; whether such a structure can be developed within the current SADC structure and whether OHADA can serve as a possible model for the SADC.

The findings show that no part of the African continent has witnessed regional legal reform on the scale of that initiated by OHADA. It equally reveals the absence of a uniform commercial law structure in the SADC and the lack of supranational structures to adopt full panoply of business laws and to preserve the uniformity of laws in the member states. The findings from this thesis provide evidence that there is the need for the development of a commercial law structure in the SADC and improvement of the current SADC structure. There is no doubt that this would do away with legal uncertainty in cross-border commercial transactions among SADC states.

Key terms: OHADA- SADC- Harmonisation- Unification- Supranationalism and Intergovernmentalism - Regional Integration - Model- Instruments and Structure

DECLARATION

I hereby declare that this thesis is the product of my own work. The content of the thesis reported herein was composed by and originated entirely from me.

I also declare that information derived from the published and unpublished work of others has been acknowledged in the text and references are given in the list of sources.

I am aware that in case of non-compliance, the University is entitled to withdraw the doctorate degree awarded to me on the basis of the present thesis.

Date: December, 2013

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I can do nothing on my own. As I hear, I judge, and my judgment is just because I lean not on my own understanding but the contributions of others without which this research would not have been possible.

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TABLE OF CONTENTS

CHAPTER 1: GENERAL INTRODUCTION

1.1 Introduction.....	1-3
1.2 Regional Economic Integration Schemes: Overview of OHADA and the SADC...	3-7
1.3 Research Problem.....	7-8
1.4 Research Objectives.....	8-9
1.5 Research Methodology.....	9-11
1.6 Significance of Research.....	12-12
1.7 Literature Review.....	12-14
1.8 Scope of Research.....	15-15
1.9 Structure of the Thesis.....	16-16
1.10 Key Words.....	17-20

CHAPTER 2: THE ORGANISATION FOR THE HARMONISATION OF BUSINESS LAWS IN AFRICA (OHADA) SYSTEM: AN OVERVIEW OF SOME BENEFITS AND PROBLEM AREAS

2.1 Introduction.....	21-22
2.2 Background to the Organisation for the Harmonisation of Business Law in Africa.....	23-26
2.3 The Constitutional Validity of the OHADA Treaty in Cameroon.....	26-33
2.4 The Benefits of OHADA's Regulatory and Institutional Framework.....	33-35
2.5 Problems in the OHADA System and the Way Forward.....	35-35
2.5.1 Incomplete Integration Challenge.....	35-36
2.5.2 Gaps in the Regulatory Framework.....	36-39
2.5.3 Interpretation Challenge.....	39-43
2.5.4 Institutional Challenge.....	43-45
2.6 Conclusion.....	45-47

CHAPTER 3: THE OHADA INSTITUTIONAL STRUCTURES AND REGULATORY FRAMEWORK

3.1 Introduction.....	48-49
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3.2	The OHADA Institutional Structure.....	49-50
3.2.1	The Conference of Heads of State and Government.....	50-50
3.2.2	The Council of Ministers (Council).....	50-52
3.2.3	Permanent Secretariat.....	52-53
3.2.4	The Higher Regional School of Magistracy and Administration (ERSUMA)....	53-54
3.2.5	The Common Court of Justice and Arbitration (CCJA).....	54-56
3.2.5.1	The Judicial Capacity of the CCJA.....	56-58
3.2.5.2	Arbitral Capacity of the CCJA.....	59-63
3.2.5.3	The Relationship between National Courts and the CCJA.....	63-65
3.3	The OHADA Regulatory Framework.....	65-68
3.3.1	The Uniform Act on Commercial Companies and Economic Interest Group...	68-68
3.3.1.1	Introduction.....	68-70
3.3.1.2	Forms of Business Organisations.....	70-72
3.3.1.2.1	Commercial Companies.....	72-74
3.3.1.2.2	Partnerships.....	74-74
3.3.1.2.3	Other Forms of Business Organisations.....	75-76
3.3.2	The Uniform Act on Collective Proceedings for the writing off Debts.....	76-76
3.3.2.1	Collective Insolvency Procedures.....	77-80
3.3.2.2	International Collective Procedures.....	80-82
3.3.3	The Draft Uniform Act on Labour/Employment.....	82-83
3.3.3.1	Fundamental Workers' Right.....	83-83
3.3.3.2	Contract of Employment.....	83-84
3.3.3.3	Termination of Employment.....	84-85
3.4	Conclusion.....	85-86

CHAPTER 4: THE SADC LEGAL FRAMEWORK AND SOME COMPARISONS WITH THE OHADA'S LEGAL FRAMEWORK

4.1	Introduction.....	87-88
4.1.1	The Basic Structure of the Southern African Development Community (SADC).....	88-92
4.1.2	The Goals and Objectives of the SADC.....	92-95

4.2	The Institutional Structure of the SADC.....	95-96
4.2.1	The Summit of Heads of State or Government (Summit).....	96-98
4.2.2	The Council of Ministers (COM).....	98-98
4.2.3	The Integrated Committee of Ministers (ICM).....	98-99
4.2.4	The Standing Committee of Officials (SCOs).....	99-100
4.2.5	The Organ on Politics, Defense and Security (OPDS).....	100-101
4.2.6	The SADC's National Committees and related National Structure (SNCs)..	101-102
4.2.7	The Secretariat.....	102-104
4.2.8	The Tribunal.....	104-104
4.2.8.1	The Tribunal and its Scope of Jurisdiction.....	104-106
4.2.8.2	Judgment and its Enforcement.....	107-110
4.3	A Comparison of the SADC and OHADA.....	110-112
4.4	The Need for a Uniform Commercial Law Structure in the SADC.....	113-113
4.4.1	Modernisation of the Commercial Laws.....	113-114
4.4.2	To cater for the increase in cross-border transactions.....	114-114
4.4.3	To cater for the rise in human and corporate migrations in the SADC.....	114-116
4.4.4	To cater for cross-border insolvency disputes.....	116-123
4.5	A Uniform Commercial Law Structure and the SADC Structure.....	123-126
4.6	Conclusion.....	126-128

CHAPTER 5: THE OHADA STRUCTURE AS A POSSIBLE MODEL FOR THE DEVELOPMENT OF A COMMERCIAL LAW STRUCTURE IN THE SADC

5.1	Introduction.....	129-130
5.2	The OHADA Structure as a Possible Model for the SADC.....	130-132
5.2.1	Dominance of Civil Law within OHADA.....	132-133
5.2.2	Dominance of the French Language.....	134-135
5.3	Lessons for the SADC.....	135-135
5.3.1	The Collective Nature of OHADA.....	135-136
5.3.2	OHADA is Business Inclined.....	136-137
5.3.3	OHADA is a Legal Investment Tool.....	137-145
5.3.4	Modern Enforcement Mechanisms.....	145-147

5.3.5 Supranational Organisations.....	147-149
5.4 Conclusion.....	149-150

CHAPTER 6: COMPARATIVE NOTES ON THE HARMONISATION OF LAWS WITHIN VARIOUS REGIONAL INTEGRATION ARRANGEMENTS IN AFRICA AND THE EUROPEAN UNION

6.1 Introduction.....	151-151
6.2 Harmonisation of Laws: A Look at the African Union and various other.....	
Regionallntegration attempts towards the Harmonisation of.....	
Laws.....	152-154
6.2.1 The African Union: Roadmap to Continental Integration.....	154-154
6.2.1.1 Harmonisation of Laws within the African Union.....	154-156
6.2.1.2 A supranational African Union.....	156-165
6.2.2 Harmonisation of laws within sub-regional economic communities (RECs).165-165	
6.2.2.1 The East African Community (EAC).....	165-169
6.2.2.2 Common Market for Eastern and Southern Africa (COMESA).....	169-171
6.2.2.3 Economic Community of West African States (ECOWAS).....	171-173
6.2.2.4 West African Economic and Monetary Union (UEMOA).....	173-175
6.2.2.5 The Economic and Monetary Union of Central African States (CEMAC)..	175-175
6.2.3 Factors Hindering the Maximal Realisation of Integration Attempts.....	
In Africa.....	175-175
6.2.3.1 Overlapping Membership.....	176-177
6.2.3.2 Differences in the Size and Level of Economic Development of African Countries.....	177-178
6.2.3.3 Lack of Funds.....	178-179
6.2.3.4 The Lack of Political Will (will theory).....	179-179
6.2.3.5 Inadequate Institutional Design.....	179-182
6.3 European Union Experience.....	182-183
6.3.1 European Union Harmonisation Experience.....	184-185
6.3.2 The European Union Institutional Set-up.....	185-186
6.3.2.1 The Council of Ministers.....	186-187

6.3.2.2	European Parliament (Parliament).....	187-188
6.3.2.3	The European Commission (Commission).....	188-189
6.3.2.4	European Court of Justice (ECJ).....	189-191
6.4	Comparative Notes on the Harmonisation of Laws in Africa and the EU..	191-193
6.5	Lessons for the SADC.....	193-194
6.6	Conclusion.....	194-196

CHAPTER 7: INTERNATIONAL INSTRUMENTS: BASIS FOR DEVELOPING UNIFORM COMMERCIAL RULES

7.1	Introduction.....	197-198
7.2	Summary of Some International Instruments.....	198-198
7.2.1	International Instruments relating to Insolvency.....	199-199
7.2.1.1	The UNCITRAL Model Law on Cross-Border Insolvency (Model Law)....	199-204
7.2.1.2	UNCITRAL Legislative Guide and World Bank Principles.....	204-206
7.2.1.3	The Unified Insolvency and Creditor Rights Standard.....	206-206
7.2.1.3.1	Creditor Rights.....	206-207
7.2.1.3.1	Risk Management and Corporate Workout.....	207-208
7.2.1.3.3	Commercial Insolvency Framework.....	208-209
7.2.1.3.4	Implementation: Institutional and Regulatory Frameworks.....	209-210
7.2.1.4	The EU Regulation on Insolvency Proceedings.....	210-214
7.2.2	International Instruments on the Law of Employment Relations.....	214-216
7.2.2.1	The Internal Law as the Governing Law of the World Bank.....	216-217
7.2.2.2	The Internal Law of the EU.....	217-221
7.2.2.3	International Labour Organisation Instruments.....	221-224
7.2.3	International Instruments on Companies.....	224-225
7.2.4	International Institute for the Unification of Private Law (UNIDROIT).....	
	Principles of International Commercial Contracts.....	225-226
7.2.5	WTO Dispute Settlement System.....	227-229
7.3	Conclusion and Significance of the International Instruments for the SADC...	229-232

CHAPTER 8: POLICY CONSIDERATION AND RECOMMENDATIONS FOR THE DEVELOPMENT OF A UNIFORM COMMERCIAL LAW STRUCTURE IN THE SADC AND IMPROVEMENT OF THE CURRENT SADC STRUCTURE

8.1 Introduction.....	233-235
8.2 Policy consideration and strategy.....	235-240
8.2.1 Company law regime.....	240-241
8.2.2 Insolvency law framework.....	241-245
8.2.2 Labour regime.....	245-246
8.3 Probable paths to the Summit and Tribunals' improvement.....	246-246
8.3.1 The Summit	246-246
8.3.2 The SADC Tribunal.....	247-251
8.4 The conditions for sound legal integration in the SADC.....	251-253
8.4 Conclusion.....	253-254

ABBREVIATIONS/ACRONYMS

AU	African Union
ACHPR	African Court on Human and People's Rights
ACJHR	African Court of Justice and Human Rights
ASEAN	Association of Southeast Asia
AMU	Arab Maghreb
AG	Advocates General
ADB	Asian Development Bank
AEC	African Economic Community
ACJ	African Court of Justice
AJCL	American Journal of Comparative Law
AJICL	Africa Journal of International and Comparative Law
Afri.Y.B.Int'l Law	African Yearbook of International Law
AIPSA	Association of Insolvency Practitioners of Southern Africa
BCEAO	Central Bank of the States of West Africa
BICEC	International Bank of Credits and Spending
CEMAC	Economic and Monetary Community of Central African States
CEO	Chief Executive Officer
COMI	Centre of Main Interest
CEN-SAD	Community of Sahel-Saharan States
Colum.JTL	Columbia Journal of Transnational Law
CIMA	Inter-African Conference on Insurance Markets

CEMAC	Monetary and Economic Community of Central African States
Council	OHADA Council of Ministers
COM	SADC Council of Ministers
COMESA	Common Market of Eastern and Southern African States
CCJA	Common Court of Justice and Arbitration
CILSA	Comparative and International Law Journal of Southern Africa
CFI	Court of First Instance
CFA	French Co-operation in the Franc Zone
CIPRES	Inter-African Conference on Social Welfare
Charter	SADC Charter on Fundamental Social Rights
DSU	Dispute Settlement Understanding
DRC	Democratic Republic of Congo
Ed	Editor
EAC	East African Community
ECA	Economic Commission for Africa
ERSUMA	Regional School of Magistracy and Administration
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EALA	East African Legislative Assembly

ECCAS	Economic Community of Central African States
EU	European Union
EEA	South African Employment Equity Act
ECSC	Coal and Steel Community
EURATOM	European Atomic Energy Community
EEC	European Economic Community
ENAM	National School of Administration and Magistracy
EJCL	Electronic Journal of Comparative Law
FTA	Free Trade Area
FDI	Foreign Direct Investment
GATT	General Agreement on Trade and Tariffs
GIE	Economic Interest Group (Groupement d'intérêt économique)
ICC	International Chamber of Commerce
IGAD	Inter-governmental Authority on Development
ICM	Integrated Committee of Ministers
IMF	International Monetary Fund
ICJ	International Court of Justice
ILO	International Law Organisation
IA	Insolvency Act
IGO	Inter-governmental Organisation

IAT	International Administrative Tribunal
ICLQ	International and Comparative Law Quarterly
Indus. LJ	Industrial Law Journal
IDEF	International Law Institute of French Expression and Inspiration
IBLJ	International Business Law Journal
JAL	Journal of African Law
JAIL	Journal of African and International Law
LRA	South African Labour Relations Act
MIP	Minimum Integration Plan
MCC	Millennium Challenge Corporation
MODEL LAW	UNCITRAL Law on cross-border insolvency
NAFTA	North American Free Trade Agreement
NGOs	Non-Governmental Organisations
NEPAD	New Partnership for Africa's Development
OAPI	Intellectual Property Organisation
OHADA	Organisation for the Harmonisation of Business Law in Africa
OJ	Official Journal
OPDS	Organ on Politics, Defense and Security
PAP	Pan-African Parliament
Para	Paragraph
RIA	Regional Integration Arrangement

RISDP	Regional Indicative Strategies Development Plan
Regulation	European Regulation on Insolvency Proceedings
SADC	Southern African Development Community
SACU	Southern African Customs Union
SADCC	Southern African Development Co-ordination Conference
SADCPF	SADC Parliamentary Forum
SCO	Standing Committee of Officials
SA	Société Anonyme (Public Limited Company)
SARL	Société a Responsabilité Limitée (Private Limited Company)
SNC	Société en Nom Collectif (General Partnership)
SCS	Société en Commandité Simple (Limited Partnership)
SARIPA	South African Restructuring and Insolvency Practitioners Association
SNC	SADC's National Committees
SCA	Supreme Court of Appeal
SALC	Southern African Legislation Centre
SA Mer.LJ	South African Mercantile Law Journal
THRHR	Journal of Contemporary Roman-Dutch Law
Tul. Eur. & Civ. L.F	Tulane European and Civil Law Forum

TPPCR	Trade and Personal Property Creditor Register
UEMOA	West African Economic and Monetary Union
UN	United Nations
UN Charter	United Nation Charter
UNIDROIT	International Institute for the Unification of Private Law
UNECA	United Nations Economic Commission for Africa
UNCITRAL	United Nations Commission on International Trade Law
UNIDA	Association for a Unified System of Business Laws in Africa
Unif. L.Rev	Uniform Law Review
U.IIL.F	University of Illinois Law Forum
WB	World Bank
WTO	World Trade Organisation
WTIA	World Trade Institute Advisors
WBAT	World Bank Administrative Tribunal
YEL	Yearbook of European Law

CHAPTER 1: General Introduction

1.1 Introduction

A range of laws exists in Africa and this is attributed to the different legal traditions inherited from Africa's colonial masters. The following legal traditions have been identified: common law; civil law; Islamic law; Roman-Dutch law; and customary law.¹ The diversity of African laws is a major obstacle to Africa's economic development. Not only does it cause unnecessary confusion and duplication in the law, it also impairs intra-regional and extra-regional trade between African states.² To illustrate, Nigeria, Cameroon, Benin and Togo share common borders but they have completely different legal systems. Trade between these countries would result in confusion over which law would be applicable. Therefore, as long as this diversity in African law remains there will be legal difficulties in terms of which laws and which forum would govern in any dispute that might arise. This situation does not bode well for a continent that is committed to promoting economic integration and alleviating poverty, and raises the question as to what efforts African countries are making or have made towards resolving the problem in respect of the diversity of laws.

African countries have concluded different regional economic integration schemes in an attempt to foster development, as can be seen in the Organisation for the Harmonisation of Commercial Law in Africa (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires* – OHADA), the Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS), the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA), to name a few.³ While African countries have devoted energy and resources towards removing the economic and political obstacles to development, they have not exhibited the same commitment towards removing legal barriers that are

¹ Oppong "Private international law and the African economic community: A plea for greater attention" 2006 *International and Comparative Law Quarterly (ICLQ)* 915.

² Mancuso "The harmonisation of contract law in Africa: An overview" 5 (hereinafter referred to as Mancuso).

³ Leno "Regionalism: Lessons the SADC can Learn from OHADA" 2012 *Journal of Contemporary Roman-Dutch Law (THRHR)* 256.

impediments to their participation in international trade.⁴ The position of Africa is best described by the late Professor Schmittoff:

The developing African countries of recent independence have had the opportunity to participate only in small degree in the activities carried out up to now in the field of harmonisation, unification and modernisation of the law of international trade. Yet those are the countries that especially need adequate and modern laws which are indispensable to gaining equality in their international trade.⁵

According to Gbenga⁶ “only recently have African countries started making any notable contributions to the formulation of the principles intended to have universal acceptance and applicability”. Allot⁷ observed that “the move towards integration of laws has been a consequence of independence, of the desire to build a nation, to guide the different communities with their different laws to a common destiny”.

It is worth noting that in spite of the increase in regional economic integration schemes, the unification or harmonisation of law of African states is limited. In French-speaking Africa, for instance, such attempts have been made in focus areas such as intellectual property,⁸ insurance,⁹ and investment¹⁰ under the auspices of the Intellectual Property Organisation (OAPI),¹¹ Inter-African Conference on Insurance Markets (CIMA), and the Monetary and Economic Community of Central African States (CEMAC) respectively.

⁴ Gbenga “Transnational law, unification and harmonisation of international commercial law in Africa” 1994 *Journal of African Law (JAL)* 130.

⁵ “Progressive development of the law of international trade” Report of the UN Secretary General- Doc.A/6396 paragraphs (paras) 210, reprinted in 1 *UNICTRAL Yearbook* 41 (1968-70). See Gbenga 1999 *JAL* 138 (hereinafter referred to as Gbenga).

⁶ Gbenga (n 5) above.

⁷ Allot “Towards the unification of laws in Africa” 1965 *International and Comparative Law Quarterly (ICLQ)* 366-378.

⁸ Intellectual Property Law of 2 March 1977 revised on 24 February 1999.

⁹ Law of 10 July 1992.

¹⁰ Investment Charter 17/99/CEMAC-020-CM-03. See Pilkington “The Security of Transactions and Investment in Africa” 33–39 (2003, unpublished and on file with author) (hereinafter referred to as Pilkington).

¹¹ *L'organisation Africaine pour la Propriété Intellectuelle* of 2 March 1977.

It is also worth remembering that no part of the African continent has witnessed regional legal reform on the scale of that initiated by OHADA.¹² In fact, very little has been done towards the development of a commercial law structure among African countries.

Against this background, the author seeks to examine the efforts of African regional economic integration schemes towards the development of a commercial law structure using OHADA and the SADC as comparative case studies.

1.2 Regional economic integration schemes: Overview of OHADA and the SADC

Africa is home to a number of regional economic integration schemes. The United Nations Economic Commission for Africa (UNECA) puts the number at 14:

Even though the African Union recognises only eight [regional economic communities], the continent currently has fourteen inter-governmental organisations (IGOs), working in regional integration issues, with numerous treaties and protocols governing relations among them, and between them and the member states. This proliferation of institutions and protocols means that out of the 53 members of the African Union (AU), 26 belong to two of the 14 IGOs, 20 belong to three of them, and one country belongs to four.¹³

There are 14 groupings in total, eight of which the AU recognised.¹⁴ This number presents an academic challenge to works on Africa's economic integration process.¹⁵ A common thread that runs through the objectives of these regional economic communities in Africa is the enhancement of economic development chiefly through

¹² Tabe-Tabe *Company formation under the OHADA uniform Act on commercial companies and economic interest groups: Changes in the law hitherto applicable in the former west Cameroon* (LLD thesis University of Yaoundé 2009) 6.

¹³ United Nations Economic Commission for Africa (UNECA) *Assessing regional integration in Africa II: Rationalising regional economic communities* (2006) x.

¹⁴ This consist of the following: the Arab Maghreb Union (UMA); Common Market for Eastern and Southern Africa (COMESA); Community of Sahel-Saharan States (CEN-SAD); East African Community (EAC); Economic Community of Central African States (ECCAS); Economic Community of Economic Community of West African States (ECOWAS); Intergovernmental Authority on Development (IGAD), and the Southern Africa Development Community (SADC).

¹⁵ Oppong *Relational issues of law and economic integration for Africa: Perspectives from constitutional, public and private international law* (LLD Thesis, University of British Columbia 2009) 13.

the harmonisation of the policies and laws of the member states.¹⁶ As noted above, the focus of the thesis is on OHADA and the SADC because they are both involved in the field of legal integration and they are both regional and international integration schemes established in Africa to attain goals shared by their member states.¹⁷

The mandate of OHADA and the SADC differs. OHADA has narrow mandate and in accordance with Article 3 of the OHADA Treaty,¹⁸ OHADA is mandated to unify the substantive commercial laws of its member states. Underlying this aim is OHADA's goal to attract foreign investment in order to foster regional economic integration and development of the member states.¹⁹ To this effect, the Council of Ministers have enacted and adopted nine Uniform Acts on general commercial law, commercial companies and economic interest groups, secured transactions, bankruptcy, debt collection procedures, accounting, arbitration, transportation and co-operatives.²⁰ These Uniform Acts are directly applicable in the contracting states.²¹ Five supranational institutions have also been created to oversee the implementation of the objectives of OHADA.²² The OHADA approach presents some advantages: through the unification of the substantive commercial laws of its member states it provides certainty in the applicable law. This subjects people transacting across national boundaries to a certain legal system.²³

¹⁶ Babatunde "Towards the harmonisation of laws in Africa: Is OHADA the way to go?" 2009 *Comparative and International Law Journal of Southern Africa (CILSA)* 309. See also Heyns and Killander (eds) *Compendium of key human rights documents of the African Union* (2006) 2-80.

¹⁷ International organisations may be described as a platform for interaction between and among Various States; see Weiller *The Constitution of Europe: Do the new clothes have an emperor? and other essays on European integration* (1999) 273.

¹⁸ The Organisation for the Harmonisation of Business Law Treaty 17 October 1993 (OHADA Treaty) as amended by the Revised OHADA Treaty 17 October 2008. The Revised Treaty came into force on 21 March 2010.

¹⁹ Art 1 OHADA Treaty.

²⁰ *Ibid*, art 2. The 10th Uniform Act on contract law is under way. Fontaine "OHADA Uniform Act on Contract Law: Explanatory Notes to the Preliminary Draft" available at: <http://www.unidroit.org/english/legalcooperation/OHADA%20explanatory%20note-e.pdf>; accessed 24 November 2011) (hereinafter referred to as Fontaine).

²¹ *Ibid*, art 10.

²² The Conference of Heads of State and Government, the Council of Ministers, the Permanent Secretariat, the Advanced Regional School of Magistracy and the Joint Court of Justice and Arbitration: OHADA Treaty, arts 27-41 OHADA Treaty.

²³ Oppong 2006 *ICLQ* 926 (hereinafter referred to as Oppong).

On the other hand, the SADC has a wider mandate and in accordance with Article 5 of the SADC Treaty, the SADC is mandated to creating a development community through regional co-operation and integration for the economic liberation and development of the community.²⁴ In this respect, a Regional Indicative Strategic Development Plan (RISDP) was designed.²⁵ The RISDP epitomises the path the SADC will take for a fifteen-year period. As outlined in the RISDP, the SADC hoped to become a free trade area (FTA) in 2008, a customs union in 2012, a common market in 2015, and an economic union in 2016. A single currency is also envisaged in 2018.²⁶ The launch of a customs union initially set for 2012 has been deferred because the member states are still implementing the FTA launched in 2008. This deferment ultimately mean that the monetary union, the economic union and single currency will not be launched.²⁷

Although the SADC does not operate a uniform commercial law system, it has some remarkable instruments already that engender uniformity in a wide array of areas including transport, banking, trade, finance and investment. Most of the instruments have been ratified and entered into force, but have not been enforced, domesticated or implemented by the member states.²⁸ This invariably means that in the event of a dispute, people or economic operators transacting across national boundaries will be subject to diverse national law systems. These separate systems are uneconomical and will engender increased transaction costs, uncertainty as to the applicable law and its jurisdiction, which may disincentivise investors.²⁹ It also raises “considerable problems for policy and programme coordination and harmonisation”.³⁰

²⁴ Ibid, art 21(3) (a) (b) (c) (d) (e) (f) and (g) of the treaty establishing the Southern African Development Community 17 August 1992 as amended (hereinafter referred to as SADC Treaty). Art 21 sets the areas of cooperation ranges from food security, agriculture, international relations and peace.

²⁵ The Regional Indicative Strategic Development Plan (RISDP) was adopted and approved in August 2003.

²⁶ Ibid.

²⁷ SADC Net ‘SADC Realigns Regional Integration Agenda’ *The Herald* 17 August 2013.

²⁸ Ibid.

²⁹ Leno “Development of a uniform insolvency law in the SADC” 2013 *Journal of African Law (JAL)* 261.

³⁰ Nangela “Harmonisation of national laws in the context of SADC regional integration: Analysis of SADC’s initiatives in the area of e-commerce” 22 (2010, unpublished and on file with author) (hereinafter referred to as Nangela).

This diverse approach also has a significantly negative influence on local and foreign investors, the people of the community, and consequently on development. Despite attempts to create a development community, it is difficult for communities to travel freely and for investors to trade easily. With regard to this obstacle, it is necessary for the SADC to embark on a comprehensive consideration and reform of its commercial laws to facilitate investment and growth of the community. Legal pundits have agreed that uniformity in commercial law and practice by the enactment of similar or unified rules can be a catalyst to the development process.³¹ Kessedjian³² points out that, “a stable legal framework is an absolute pre-condition for the encouragement of investment and the advancement of development”. Arguably, the development of a commercial law structure in the SADC can provide a boost to the SADC’s integration. It will also make it easier to identify the applicable law, to minimise fraud committed by debtors, to expedite determination of cases, and save time and resources in the resolution of disputes. To drive home this point, Nana Addo emphasised that:

It is now obvious that our evolution and growth will be a function of how we manage to attract domestic and international investment into the region. An important aspect of such an evolution would be a uniform and harmonised [commercial] law, clearly formulated and transparently applied all over the region. With such a system in place, investors who wish to embark on regional projects would not have to contend with multiplicity of laws, which serve to confuse, not assist, the potential investor.³³

From this background, it is apparent that the SADC urgently requires a uniform commercial law system. After all, one of the SADC’s objectives is “to harmonise [the] political and socio-economic policies and plans of [its] member states”.³⁴ The moot points, however, are whether:

- there is the need for the development of a commercial law structure in the SADC;

³¹ Muna “Is OHADA common law friendly?” 2001 *International Law Forum du Droit International* 178.

³² Kessedjian “Introduction” 2001 *International Law Forum du Droit International* 149. Sayi *Harmonisation of Insolvency Law in East African Community* (LLM Dissertation, Vrije University, Amsterdam 2006) 23.

³³ Cited in Muna 2001 (n 31) 15 (hereinafter referred to as Muna). Nana Addo is a politician, political lawyer and advocate of Ghanaian democracy.

³⁴ Art 5(2) (a) SADC Treaty.

- a commercial law structure can be developed within the current SADC structure; and
- whether OHADA can serve as a possible model for the SADC.

Based on the abovementioned underlying concerns of this thesis, the thesis is based on the following assumptions:

- that there is the need for the development of a commercial law structure in the SADC;
- that a commercial law structure cannot be developed within the current SADC structure; and
- that OHADA cannot serve as a possible model for the SADC.

1.3 Research Problem

The broad research field of this thesis rests on the fact that in a region where there is diversity of laws, law reform is a catalyst for investment and development. This assertion is strengthened by the fact that investors' decisions to invest or do business in any place is influenced *inter alia* by the attractiveness of the laws and institutions that promote justice for all players in the market.³⁵ Consequently, uniform or unified rules will restore investors' confidence regarding their transactions. It also brings a sense of "security and peace of mind" which, according to Nangela, marks the basis of all enterprise and extension of business, and hence the greater realisation of economic benefits in numerous sectors.³⁶

Diversity of laws is endemic in the SADC.³⁷ The best manifestation of the SADC's inattention to diversity of laws is the disjunction between national and community law.

³⁵ In terms of art 3 (2) ECOWAS Treaty 1975, an enabling legal environment is a prerequisite for harmonisation of business law. But over the 36 years of existence of the treaty, this provision has never been invoked.

³⁶ Nangela (n 30) 7-8.

³⁷ Ramolotja and Mpedi "Labour law in Southern Africa: A look at South Africa and Swaziland" 2000 *Mercantile Law Journal* 420-431. The SADC members have subscribed to the International Labour Organisation (ILO) principles and guidelines which do not guarantee the protection of workers in the event of their employer's insolvency or free movement of labour within the community.

To date this disjunction has not received any systematic attention in community treaties and related laws, and a similar inattention is manifested by local courts and in inter-state relations. For example, the issue of recognition and enforcement of the SADC's tribunal judgments have not been addressed.³⁸ The thesis argues for the development of a commercial law structure because it is an important issue for investment and development of the SADC community, but the questions remain:

- is there the need for the development of a commercial law structure in the SADC;
- can a commercial law structure be developed within the current SADC structure;
and
- can OHADA serve as a possible model for the SADC?

1.4 Research Objectives

OHADA's Permanent Secretary, Dorothé Sossa, said, "Pooling, as is the case with OHADA, and sharing reform experiences is an opportunity to improve national and regional competitiveness."³⁹ This follows OHADA's move towards the development of a commercial law structure. The development of a commercial law structure is a good initiative and a very important reform for the SADC, which if achieved, can boost trade in the region by making it easier for local firms to do business. It can also facilitate loan acquisitions,⁴⁰ increase regional collaboration and enhance the territory's economic development by making it more attractive to foreign investment.⁴¹ OHADA provides best practice for implementation of legal reform in Africa. Guinea's Minister of Industry and Small and Medium Enterprises, Rahamatoulaye Bah, said, "We learned a lot from our neighbours about how to make our business environments better. ... When you see a

³⁸ See the *Mike Campbell (Pvt) Ltd & others v Republic of Zimbabwe* case No. SADC (T) 2/2007.

³⁹ World bank group 2013 <https://www.wbginvestmentclimate.org/regions/a-common-cause-for-better-business.cfm> at 1.

⁴⁰ IFC and World Bank 2013

<http://www.businessincameroon.com/business/2210-4384-ohada-counts-achievements-in-cameroon> at 1.

⁴¹ Houanye and Shen "Investment promotion in the framework of the treaty of harmonising business law in Africa (OHADA) 2013 *Beijing Law Review* 6.

best practice example in the country next door, it motivates you to want to do the same in your country.”⁴²

The SADC cannot ignore what OHADA is doing. The regional economic climate is not conducive to investment or to development in general, and as such, it is difficult to conduct business in the SADC.⁴³ Makokera *et al*⁴⁴ mentioned the lack of stability and predictability of macroeconomic policy, and the unfavourable investment climate as the primary obstacles behind sustaining and attracting new business investment. For the author, legal and judicial insecurity are the primary obstacles behind sustaining and attracting new business investment in the region. The World Bank (WB) group said, “Just as good rules are needed to allow traffic to flow in a city, they are also essential to allow business transactions to follow”.⁴⁵ The desire to attract foreign investment should push the SADC to develop a commercial law structure designed to create favourable investment climate. It is obvious lawyers and their clients alike will welcome this initiative, the implementation of which should not be an affair of the politicians, but of all including private and public stakeholders so that the fruits can be visible in the region.

Based on the foregoing, the thesis aims at demonstrating that OHADA provides best practice and practical experience for the development of a common commercial law structure in the SADC.

1.5 Research Methodology

It is submitted that “continued investment and development of Africa cannot be achieved without a secure legal environment to protect private property, and a strong and independent judicial legal system to ensure a proper application of the law and

⁴² See (n 40) above.

⁴³ World Bank ‘Doing Business 2012/ Progress in Regulatory Reform Expands Business Opportunities Across OHADA Member States’ World Bank Doing Business Report 2012. The Report also shows a decrease in the time required to set up a business in Senegal (to five days only) and to obtain a construction permit in Burkina Faso (98 days, that is three months faster than in the European Union) at 1 (hereinafter referred to as WB Report 2012).

⁴⁴ Makokera *et al* 2012 “Business contracts in SADC: An analysis of business and investment climate Surveys” 2012 Top_10_Business_Constraints_in_SADC.pdf at 4. See *also* Source: World Bank Doing Business Report (2012).

⁴⁵ Doing Business 2013 available at <http://www.iadb.org/jntal/intalcdi/PE/2013/12464.pdf> at 4.

efficient settlement of disputes".⁴⁶ Kufor⁴⁷ asserts that a credible and transparent legal system will contribute significantly in determining the criteria that investors apply when deciding where to invest, while an enhanced dispute resolution mechanism and harmonised business law will reduce the risk of executing regional projects. Unless, and until, an enabling legal environment and an enhanced dispute resolution mechanism are created, the goal of a regional economic and social integration cannot be realised.

Thus, as the SADC enters another level of integration in the form of an FTA, the author suggests that it is an appropriate moment to develop uniform commercial rules to address the challenges relating to cross-border trade, and to realise the benefits associated with it, one of which is trade facilitation.⁴⁸ The trade facilitation here entails the free establishment of companies and movement of people across the community, and the treatment of similarly situated creditors in the event of insolvency. The author proposes the establishment of sound, transparent, and supranational structures. At present there is general international recognition that sound, transparent, independent, and supranational structures are an essential part in the creation of predictable, accessible, and modern commercial laws.⁴⁹ In light of this, the author seeks to:

- Compare the structures of OHADA and the SADC. Within this context, the thesis uses a structured focused comparison methodology that allows for two separate, but structurally linked accounts of the structures of OHADA and the SADC. This is used to capture points of convergence and divergence of OHADA and the SADC. A descriptive approach will be adopted in order to lay the basis for a comprehensive analysis of the structures of OHADA and the SADC.
- In exploring the structures of OHADA and the SADC, the thesis endeavours to:
 - a.) Determine whether there is the need for the development of a commercial law structure in the SADC. Due to the paucity of reliable and uniform data and studies on the commercial laws of the SADC states, reference is

⁴⁶ Martor *et al Business law in Africa: OHADA and the harmonisation process* (2002) 1.

⁴⁷ Ibid, vi.

⁴⁸ Monapathi 2005 <http://www.uohj.com> at 1 (hereinafter referred to as Monapathi).

⁴⁹ Calitz *Reformatory approach to state regulation of insolvency law in South Africa* (LLD Thesis University of Pretoria, 2009) chapter (ch) 1 at 8.

made to the SADC countries for which there are data and studies: South Africa, Namibia, and Botswana constitute the point of departure.⁵⁰ To address this issue, the starting point would be to study textbooks and cases.⁵¹ A positional sampling is employed to select respondents from the different countries. The convenient sampling method is used purposively to get expert knowledge and multi-vocal perspectives on the subject. Face-to-face interviews will be conducted with key informants who in this case are lawyers, judges, scholars, business people, and members of the SADC institutions, all of whom are involved with the laws on a daily basis. Moreover, automated telephone interviews will be used in order to save time and to avoid a waste of resources. This method will enable the author to probe with follow-up questions.

- b.) Determine whether a commercial law structure can be developed within the current SADC structure. This question is answered by analysing the eight principal SADC Treaty institutions as reflected in Article 9 (1) of the SADC Treaty. Literature study is the starting point as it provides the background and highlights areas of development and gaps in understanding the current SADC structure.
- c.) Determine whether OHADA can serve as a possible model for the SADC. In meeting this objective, the OHADA experience is studied. To complement the work of OHADA, other regional bodies both within and outside Africa are studied, as well as international instruments designed to promote a uniform commercial law structure with a view to highlighting lessons for the SADC to learn.

⁵⁰ It is because of the similarities in the commercial laws of the countries and their legal systems. It is also because they belong to the Southern African Customs Union (SACU) and SADC which entails a great deal of policy coordination. See Gibb "Regional Integration in post-apartheid Southern Africa: The case of renegotiating the Southern African Customs Union" 1997 *Journal of Southern Africa Studies* 75-76.

⁵¹ Steyn "A reflection on the need for cross-border insolvency legislation in South Africa" 1997 *South African Mercantile Law Journal (SA. Mer. LJ)* 224-232. See Smith and Boraine "Cross-border insolvency law and local creditors' risk of receiving payment from a foreign company registered as an external company in South Africa" 2004 *SA Mer. LJ* 495-524.

- d.) Conclude with some recommendations for the SADC to improve its current structure and to develop a unified commercial law structure in the region.

1.6 Significance of Research

The significance of this thesis lays both in undertaking the research and in the modest contributions it makes to the structure and functioning of OHADA and the SADC. The undertaking of this study is invaluable in that it raises the need for the development of a commercial law structure in the SADC and improvement of the current SADC structure. The study further seeks to contribute to the development of a commercial law structure in the SADC, and in the improvement of the current SADC and OHADA structures. It also contributes to the analysis and promotion of the OHADA laws that are still obscure to many English-speaking African countries.

1.7 Literature Review

It is proposed that the diversity of laws is an impediment to Africa's development.⁵² Within the African context, Gbenga⁵³ acknowledged the efforts taken by African countries towards the progress and development of the continent, but indicated that African countries have not exhibited the same commitment to removing the legal barriers that impede their participation in international trade. In order to promote trade and attract investment, there is a need for African countries to address the diversity of law problem that affects both intra-regional and extra-regional trade. In addressing the problem of diversity of laws, the thesis proposes the unification or harmonisation of laws, particularly those affecting trade on the continent, such as company, insolvency, and labour laws.

Regarding the SADC, a number of writers found evidence to support the contention of the harmonisation of commercial laws in the SADC,⁵⁴ and on the possibility of

⁵² See para 1.1 above.

⁵³ Gbenga (n 5) 130.

⁵⁴ According to Jakoba, SADC should "follow a new phase which is the harmonisation of national laws

integrating the SADC states' commercial laws.⁵⁵ The premise on which this study is based has not been addressed or explored by any previous researchers or writers. Many works have addressed the insolvency and labour laws of Southern African states. While some authors call for a regional convention on insolvency law, others call for a regional labour law. Ramolotja and Mpedi⁵⁶ explored the labour laws of South Africa and Swaziland wherein they called for a joint approach. On his part, Woolfrey⁵⁷ called for harmonisation of Southern Africa's labour in the context of integration. Hepple⁵⁸ advocated for a level playing field in employment law, by proposing the adoption of different approaches.

Boraine and Van Eck⁵⁹ argued for the development of coherent labour and insolvency principles on a regional basis in the SADC countries, which, according to them, will enhance uniformity and mobility within the region. Their study is important to this study. Fey⁶⁰ writes that "it is very important that the countries of Southern Africa work towards a common approach as regards social policy in order to engage in the global economy in such a way that the benefits are distributed more equally and equitably". According to him, the development of "a common approach to social policy at the regional level is important because of two related factors ... globalisation and the reduced capacity of collective action in defence of labour standards".⁶¹

because there cannot be secure trade relations between the different states in the area of integration if their national laws are different"; see Jakoba "The harmonisation of business laws in the countries of the SADC Region" 2-3 (2010, unpublished and on file with author).

⁵⁵ Nangela advocates for the harmonisation of national rules regarding e-commerce in the context of SADC regional integration on the basis that it is an important ingredient to SADC's legal harmonisation process; Nangela (n 30) 1-29. Letete discussed the possibility of the SADC's state to coordinate in design and implementation of value added tax in the region; see Letete "Value added tax and trading blocs: Enhancing socio-economic integration in SADC member states" 1-17 (2011, unpublished and on file with author).

⁵⁶ Ramolotja and Mpedi 2000 *SA Mer. LJ* (n 38) above.

⁵⁷ Woolfrey "harmonisation of southern Africa's labour law in the context of integration" 1991 *Industrial Law Journal (Indus. LJ)* 703-721.

⁵⁸ Hepple "Harmonisation of Labour law: Level playing Field or Minimum" 2009 *De Jure* 1-13.

⁵⁹ Boraine and Van Eck "A plea for the development of coherent labour and insolvency principles on a regional basis in the SADC countries" in Omar J (ed) *International insolvency law: Themes and perspectives*(2008) 293.

⁶⁰ Fey "Labour standards in Southern Africa in the context of globalisation: The need for a common approach" 1999 *Industrial Law Journal (Indus. LJ)* 1447.

⁶¹ *Ibid*, 1446.

Leno⁶² discussed the need for a uniform insolvency law in the SADC, with lessons from OHADA. This work is important because it plots a course for the development of a uniform insolvency law in the SADC. Borraine and Olivier discussed the various attempts and initiatives to establish a more uniform cross-border insolvency regime. Ailola⁶³ emphasised the importance of a convention as an instrument to achieve cooperation in cross-border insolvency cases. He also identified the problems that have prevented consensus on some treaties and conventions. Despite these problems, he argued that there is still the possibility of a ratifiable convention based on a number of factors.⁶⁴ The value of this work lies in its relevance to the study. Finally, Keay⁶⁵ discussed a unification of insolvency statute, addressing the key areas that need to be considered when attempting to achieve such a goal. This work is important because it highlights lessons that can be learnt from other countries that have passed through the same route and from those that have failed in their attempts to enact a unified legislation.

With respect to the writers referred to, none of them mentions the need to develop a commercial law structure in the SADC. Since commercial law is a broad field of law, the focus of the thesis will be limited to the company, insolvency, and labour laws because they are intrinsically linked to each other. The thesis also mentions the need for an improvement of the current SADC structure and provides the path along which the current structure can be improved. This makes this work different to that of other writers. Indeed, it is the first instance where the need to develop a commercial law structure in the areas of unify the insolvency, company, and labour laws of the SADC states is raised.

⁶² Leno *JAL* (n 29) 259-282 (hereinafter referred to as Leno).

⁶³ Ailola "Recognition of foreign proceedings, orders and officials in insolvency in southern Africa: A call for a regional convention" 1999 *Comparative and International Law Journal of Southern Africa (CILSA)* 57.

⁶⁴ They are among others; marked similarities between the insolvency laws of some of the countries, The commonality of investors and harmonious economic relations between the member states, Cultural and linguistic and in some respects common history. See the preamble of the SADC Treaty.

⁶⁵ Keay "To unify or not to unify insolvency legislation: international experience and the latest South African proposals" 1999 *De jure* 62-79.

1.8 Scope of Research

The need for the development of a commercial law structure has received much attention. In order to delimit and define the scope of this study in view of the area of research envisaged in the previous paragraphs, this thesis is primarily focused on the legal frameworks and governance structures of OHADA and the SADC with a view to demonstrating that OHADA provides best practice for the development of a commercial law structure in the SADC and improvement of the current SADC structure. Within this context, the structures of both organisations will be variously called “institutions”, “bodies”, or “organs”. In examining the structure of OHADA, the emphasis is on OHADA’s regulatory framework and its institutional structure that supports the growing system of modern business related statutes, that is the legislature that adopts a full panoply of business laws; a supranational court that helps to preserve the uniformity of laws by issuing decisions which are directly applicable in the member states; a permanent secretariat to perform executive functions; and a training school that educates legal officers on the laws.⁶⁶

The focus on the SADC structure would be on the eight principal SADC Treaty institutions, as reflected in Article 9 (1) of the SADC Treaty.⁶⁷ An assessment of the structures of both organisations will entail scrutiny of the functions of the institutions, powers, decision-making processes, and the status of their decisions. Since commercial law is a broad field of law, the focus of this study will be limited to company, insolvency and labour laws, which all interact and play an important role in the SADC.

⁶⁶ See (n 22) above.

⁶⁷ These institutions are, the Summit of Heads of State or Government (art 10 SADC Treaty), the Organ on Politics, Defense and Security Cooperation (OPDSC-arts 10 SADC Treaty and 2 SADC Protocol on the OPDSC), the Council of Ministers (art 11 SADC Treaty), the Integrated Committee of Ministers (art 12 SADC Treaty), the Standing Committee of Officials (art 13 SADC Treaty), the Secretariat (art 14 SADC Treaty), the Tribunal (art 16 SADC Treaty), and the SADC National Committees (art 16 (a) SADC Treaty). The one benefit of increasing the size of an organisation like OHADA would be the enjoyment of uniform commercial rules by African states. The second would be the opportunity given to English lawyers to be trained at ERSUMA or be employed by the organisation.

1.9 Structure of the Thesis

For a framework within which the introduction or creation of a supranational entity or uniformity can take place within the SADC, this thesis follows a five-stage plan of development that is reflected below:

- **Part I** consists of this introduction and sketches the background of the thesis and outlines the objectives to be addressed in the chapters that follow;
- **Part II** focuses on an inspection of OHADA, its benefits and problem areas. It also focuses on an analysis of the regulatory and institutional structures of OHADA, both of which are committed to the enhancement of private order, and the creation of a reliable and usable system that responds to the needs of the region. This is for the purpose of determining whether OHADA can serve as a model for the SADC.
- **Part III** focuses on the regulatory and institutional framework of the SADC, with a view to ascertaining the need for the development of a uniform commercial law structure, and whether such a structure can be developed within the current SADC structure.
- **Part IV** is concerned with the status of OHADA as a possible model for the SADC. This section contains some lessons the SADC can learn from OHADA.

To supplement the work of OHADA, certain regional bodies in Africa are discussed and compared with the European Union (EU), because the EU provides the model of harmonisation for African states. The examination of other regional bodies and the EU's legal integration process is to provide lessons for the SADC. International law instruments are also discussed as a basis for developing conflict of law rules. The aim is to provide the SADC with a sense of how conflicts of law rules are developed.

- **Part V** concludes with some conclusive remarks and recommendations for the development of a commercial law structure in the SADC, and for improvement of its structure.

1.10 Key Words

1.10.1 OHADA: The Organisation for the Harmonisation of Business Law in Africa

1.10.2 SADC: Southern African Development Community

1.10.3 Harmonisation and Unification

Harmonisation should not be confused with unification.⁶⁸ They are two sides of the same coin all seeking to promote a common destiny through the internationalisation of legal rules.⁶⁹ Although it is difficult to draw a line between harmonisation and unification, it is useful to consider some definitions of both. Unification is defined as a process that creates a new and uniform legal norms through the incorporation of congruent legal systems while harmonisation is a process which recognises the differences in the laws or legal systems and attempts to reduce or eliminate the conflicts between the laws by creating common minimum standards.⁷⁰ One cannot but agree with Menski that harmonisation does not necessarily amount to “a vision of total uniformity”.⁷¹ Leebron⁷² defines harmonisation as “making the regulatory requirements or governmental policies of different jurisdictions identical or at least more similar”.

For Ademola,⁷³ harmonisation is a “process whereby national laws are not totally ignored. Instead, community law becomes integrated within the framework of national

⁶⁸ See Nam 2009 Future of harmonisation and unification in contract law regarding “Battle of forms”. Available at: <http://www.cisg.law.pace.edu/cisg/biblio/nam.html>; accessed 17 December 2011.

⁶⁹ Lynch *The forces of economic globalisation: Challenges to the regime of international commercial arbitration* (2003) 198.

⁷⁰ Mistelis “Is harmonisation a necessary evil? The future of harmonisation and new sources of international trade law” in Fletcher I *et al* (eds) *Foundations and perspectives of international trade law* (2001) 4. See also Ziegel “Harmonisation of private laws in federal systems if government: Canada, the USA and Australia” in Cranston R (ed) *Making commercial law: Essays in honour of Roy Goode* (1997) 133.

⁷¹ Menski *Comparative law in a global context: The legal systems of Asia and Africa* (2006) 39 (hereinafter referred to as Menski).

⁷² Leebron “Claims for harmonisation: A theoretical framework” 1996 *Canadian Business Law Journal* 63 at 66.

⁷³ Ademola “Community laws in international business transactions” in Dickerson *Unified business laws in Africa: Commercial perspectives on OHADA* (2009) 1.

laws” while unification is a process which “requires at least one of the participating countries, and perhaps all of them, to substitute a new law in order to achieve identity”.

The essential thing is both techniques are aimed at reaching an understanding “which will bring to an end the uncertainty, confusion and chaos characterising a particular situation”.⁷⁴ To conclude, it may be argued that the difference between harmonisation and unification is difference of form rather than of substance. Though harmonisation is not generally acceptable as the best solution to the underlying problem (of conflict of laws)⁷⁵ because it is more challenging in the sense that it requires comparison and coordination of laws that are different on their face,⁷⁶ the author believes it is the most desirable technique for the development of uniform commercial laws for a community invested with divergent national laws.⁷⁷ This assertion is strengthened by the fact that it is flexible in the sense that it allows for the co-existence between community law and national laws and because it does not trample national sovereignty.

1.10.4 Supranationalism and Inter-governmentalism

International organisations may either be supranational or inter-governmental in nature. According to Babatunde⁷⁸ “inter-governmentalism accentuates the dominant structure of the nation states in international relations”. He emphasizes the active role of nation states in the policy making process. In other words, states are privileged players in the decision-making process. Nugent distinguished between inter-governmentalism and supranationalism. According to him:

Inter-governmentalism is an arrangement whereby nation states, in situations and conditions they can control, cooperate with one another on matters of common interest. The existence of control, which allows all participating states to decide the extent and nature of this cooperation means that national sovereignty is not undermined; while supranationalism involves states working with one another in a manner

⁷⁴ Rene “The methods of unification” 1968 *American Journal of Comparative Law* (AJCL) 13.

⁷⁵ For the different arguments levied against the process of harmonisation; see McCormack *Secured credit and the harmonisation of law: The UNCITRAL experience* (2011) 33-41.

⁷⁶ Issa-Sayeh “Quelques aspects techniques de l’intégration juridique: L’exemple des actes uniformes de l’OHADA” 1995 *Uniform Law Review* 5.

⁷⁷ Brilmayer *Conflict of laws foundations and future directions* (1991) 157.

⁷⁸ Babatunde “A supranational African Union? Gazing into the crystal ball” 2008 *De Jure* 494.

that does not allow them to retain complete control over developments. That is, states may be obliged to do things against their preferences and their will because they do not have the power to stop decisions. Supranationalism thus takes inter-state relation beyond cooperation into integration, and involves some loss of sovereignty.⁷⁹

It follows from the definition above that with inter-governmentalism, national sovereignty is not undermined. As a result, participating states exercise control on matters of common interest. As regards supranationalism, there is loss of sovereignty in favour of supranational organisation or institutions. In fact, the uniqueness of the EU lies in the fact that it embodies both supranational as well as intergovernmental features in its system of governance. This reflects in the EU having both types of institutions: the supranational organised Commission, Parliament and the Court of Justice and their inter-governmental based counterparts such as the European Council and the Council of Ministers.

Haas⁸⁰ defined supranationalism as “the existence of governmental authorities closer to the archetype of federation than any past international organisations, but not yet identical with it”, while Rosamond⁸¹ defined it as “the development of authoritative institutions of governance and network of policy-making activity above the nation states”. With reference to the EU, Weiller⁸² distinguishes between two types of supranationalism: normative and decisional supranationalism. According to him, normative supranationalism entails “the relationship and hierarchy which exists between the EU policies and legal measures on one hand, and competing policies and legal measures of member states on the other,” while decisional supranationalism “relates to the institutional framework and decision-making processes by which community policies and measures are, in the first place, initiated, debated and formulated, then

⁷⁹ Nugent *The government and politics of the European Union* (2006) 10.

⁸⁰ Haas *The unity of Europe: Political, social and economic forces 1950 - 1957* (1958) 59.

⁸¹ Rosamond *Theories of European integration* (2000) 204.

⁸² Weiller “The community system: The dual character of supranationalism” 1981 *Yearbook of European Law* (YEL) 271.

promulgated and finally executed”.⁸³ Weiller’s definition denotes the existence of three situations:

- Firstly, whether the policies and laws of such an organization has direct effect in the member states (doctrine of direct effect);
- Whether the laws of the organisation are superior to the laws of member states (the doctrine of supremacy) defined as “the capacity of a community norm to overrule inconsistent norms of national law in domestic proceedings”; and
- Whether member states are pre-empted from enacting contradictory legislation.⁸⁴

All of these features are embodied in the institutional machinery of the EU and OHADA. As will be revealed in the subsequent chapters, the supremacy of the EU and OHADA laws over national laws and the direct effect in the territory of member states make them supranational organisations.⁸⁵ Hay describes supranational organisations as “organisations that possess both independence from and power over their constituent states to a degree which suggests the emergence of a new federal hierarchy and which goes beyond traditional intergovernmental cooperation in the form of international organisations”.⁸⁶ The distinction between inter-governmentalism and supranationalism is in order to determine the extent to which OHADA and the SADC states have abrogated their powers.

⁸³ Ibid.

⁸⁴ Babatunde *A politico-legal framework for integration in Africa: Exploring the attainability of a supranational Africa Union* (LLD-Thesis University of Pretoria 2010) 140.

⁸⁵ Ibid.

⁸⁶ Hay “International and supranational organisations: Some problems of conceptualisation” (1965) *University of Illinois Law Forum (U.III.L.F)* 733.

CHAPTER 2: The Organisation for the Harmonisation of Business Law in Africa (OHADA) System: An Overview of Some Benefits and Problem Areas

2.1 Introduction

In the early 1960s, the African states in the franc zone⁸⁷ applied outdated and inconsistent French laws,⁸⁸ ranging from the French civil code to the 1804 commercial code.⁸⁹ This inconsistency resulted in legal uncertainty regarding the applicable laws and incurred unnecessary costs to cross-border business transactions, considerably harming investment prospects in the zone.⁹⁰ Consequently, the ministers of finance in the franc zone African states decided to appoint a high-level working group to investigate the problem, and consider possible solutions.⁹¹ After months of investigations, the group concluded that it was feasible and necessary to create a new business law for the francophone African states. This led to the signing of the Treaty⁹² relating to the harmonisation of business law in Africa (OHADA treaty) by 14 African states⁹³ which established OHADA, literally translated as the Organisation for the Harmonisation of Business Law in Africa, with the signatory states agreeing to relinquish some of their sovereignty.⁹⁴

⁸⁷ It is a monetary union of French-speaking African countries whose economies are linked to the French Francs at a fixed rate of exchange. They include Benin, Burkina Faso, Côte d'Ivoire, Cameroon, Central African Republic, Congo, Chad, Equatorial Guinea, Gabon, and Federal Republic of the Comoros, Guinea Bissau, Mali, Niger and Senegal.

See (<http://www.businessdictionary.com/definition/Franc-zone-ZF.html>; accessed 4 October 2011).

⁸⁸ Prior to harmonisation, the commercial laws were diverse with very little knowledge and clarity about the applicable law to a commercial dispute. This largely discouraged investors from investing in the France zone.

⁸⁹ Tiger "Les procédures collectives après cessation des paiements en droit harmonisé de l'OHADA" 2004 *Petites Affiches* 35 (translated as "Collective insolvency proceedings under OHADA law").

⁹⁰ Martor and Thouvenot "L'uniformisation du droit des affaires par l'OHADA" 2004 *Juridis périodique* 5-11 (translated as "Unification of business laws by OHADA").

⁹¹ Martor *et al* (2002) 147 (hereinafter referred to as Martor *et al*).

⁹² 17 October 1993. It entered into force on 19 September 1995 (hereinafter referred to as OHADA Treaty). The OHADA treaty was amended on the 17 October 2008 (hereinafter referred to as the Revised OHADA treaty). See Youmis "Traite relatif a harmonisation du droit des affaires en Afrique Commentaire" 1997 *Juridis périodique* 98 (translated as "Treaty relating to the harmonisation of business law in Africa").

⁹³ The OHADA treaty is now ratified by 17 Western and Central African states, namely, Benin, Burkina Faso, Central African Republic, Chad, Cameroon, Comoros, Congo, Democratic Republic of Congo (DRC), Equatorial Guinea, Guinea, Guinea Bissau, Gabon, Côte d'Ivoire, Mali, Niger, Senegal and Togo. See (<http://www.ohada.com/pays/>; accessed 17 October 2011).

⁹⁴ Abarchi "La supranationalité de l'organisation pour l'harmonisation en Afrique du droit des affaires

OHADA is designed to create a single economic space for investors, and to promote economic integration of the member states⁹⁵ through the creation of supranational institutions such as the Conference of Heads of State and Government, the Common Court of Justice and Arbitration (CCJA), the Permanent Secretariat, and the Regional School of Magistracy and Administration (ERSUMA)⁹⁶, and adoption of commercial rules called Uniform Acts⁹⁷ that are directly applicable in the member states.⁹⁸ The establishment of these institutions and the adoption of the Uniform Acts sought to improve the legal and judicial protection in commercial transactions.⁹⁹ These developments facilitate regional solidarity and trade among its member states, and also promote certainty that cannot be achieved in isolation by individual states. Nevertheless, OHADA still faces numerous problems and the critical question is whether the benefits of uniformity outweigh the costs of preserving state sovereignty.¹⁰⁰

The primary focus of this chapter is to present OHADA's background; offer an overview of some of the salient benefits of OHADA's institutional and regulatory framework; consider OHADA's problem areas; and propose possible solutions to the problems. The value of this chapter therefore lies in the insight it offers into OHADA, and the benefits and problems of its institutional and regulatory framework. It is also important because it is laying the foundation in making the OHADA structure available for all Africans.

(OHADA)" 2000 *Revue Burkinabé du Droit* 10-11 (translated as the "Supranationality of OHADA). FIAS 2008

[http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/FIAS_Donors_OHADA/\\$FILE/FIASDMSpotlightOHADA+Project.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/FIAS_Donors_OHADA/$FILE/FIASDMSpotlightOHADA+Project.pdf) at 1 (hereinafter referred to as FIAS).

⁹⁵ Art 3 OHADA treaty.

⁹⁶ Art 3 Revised OHADA treaty. The institutions include Conference of Head of States and Government (art 27 Revised OHADA treaty), the Council of Ministers (the Council - arts 27-30 OHADA treaty and 45 Revised OHADA treaty), the Common Court of Justice and Arbitration (CCJA - arts 31-39 OHADA Treaty), the Permanent Secretariat (art 40-41 Revised OHADA treaty) and the Higher Regional School of Magistracy and Administration (ERSUMA- art 41 OHADA treaty).

⁹⁷ Arts 2 and 5 OHADA treaty.

⁹⁸ Ibid, art 10. "Direct effect relates to specific rights (e.g. equality between men and women). Direct applicability relates to an entire legislative act e.g. a Regulation. So, direct effect does not mean that the provision becomes part of national law, whereas direct applicability does"; see "EC Law – directly applicable and the doctrine of direct effect" available at: http://sixthformlaw.info/01_modules/mod2/2_3_2_eu_sources/08_doctrine_of_direct_effect.htm; accessed 11 February 2014.

⁹⁹ Prempeh-Eck 2009 <http://www.ghanalaw.com/content/challenges-faced-common-law-jurisdictions-realise-ohada-objectives> at 1 (hereinafter referred to as Prempeh-Eck).

¹⁰⁰ Ruta *Economic theories of political (dis) integration* (2005) 2.

2.2 Background to the Organisation for the Harmonisation of Business Law in Africa (OHADA)

OHADA is an organisation that strives for the harmonisation of business law in Africa. This aim is underpinned by OHADA's objectives to guarantee legal certainty and judicial security for investors¹⁰¹ and the African economies and, hence, to attract foreign investment in order to foster regional economic integration and development of the member states.¹⁰² These objectives fall within the framework of the New Partnership for Africa's Development (NEPAD), as agreed at the Group Eight (G8) Kananaskis Summit.¹⁰³ To this effect, the Council has adopted nine Uniform Acts¹⁰⁴ and five institutions have been created to oversee the implementation of OHADA's objectives.¹⁰⁵

OHADA is the manifestation of the political will of the ministers of finance and justice of the franc zone¹⁰⁶ to create uniform rules for the restructuring and amendment of the legal environment.¹⁰⁷ Keba succinctly describes OHADA as "a legal tool thought out and designed by and for Africa to serve the purposes of regional integration and economic growth on the continent".¹⁰⁸ Dickerson provides a more elaborate definition; she states that:

¹⁰¹ Penda and Tumnde 'The roadmap of the harmonisation of business law in Africa' 7 (http://www.ohada.com/biblio_detail.php?article=452; accessed 28 October 2011) (hereinafter referred to as Penda and Tumnde).

¹⁰² Art 1 OHADA treaty provides: "the objective of the present treaty is the harmonisation of business law laws in the contracting states by the elaboration and adoption of simple, modern and common rules adapted to the their economies, by setting up appropriate judicial procedures, and by encouraging arbitration for the settlement of contractual disputes". For a discussion on art 1 of the OHADA treaty; See Noah "l'Espace Dual du System OHADA" 2006 *Presses Universitaire d'Afrique* 29-44. (Translated as Noah "Dual system of OHADA"). See also Kenfack 2001 ftp://ftp.worldbank.org/pub/FIWEEK2011/15_17MAR_Secured_Transactions/17_2/Gaston_Kenfack_1.pdf at 1 (hereinafter referred to as Kenfack).

¹⁰³ Delaye "Forward" in Martor *et al* (eds.) (2002) xxviii (hereinafter referred to as Martor *et al*). The Summit focused on investment-driven economic growth and economic governance as the engine for Poverty reduction and on the importance of regional and sub-regional partnerships within Africa.

¹⁰⁴ Art 2 OHADA treaty. The tenth UA on contract law is under way; see Fontaine 2004 (www.unidroit.org/engsih/legalcooperation/OHADA%20explanatory%20note-e.pdf; accessed 1 May 2013)

¹⁰⁵ See art 3 Revised OHADA treaty.

¹⁰⁶ Martor *et al Business law in Africa: OHADA and the harmonisation process* (2007) 284-285.

¹⁰⁷ Penda 2008 www.ohada.com/infohada_details.php_at_1-6 (hereinafter referred to as Penda).

¹⁰⁸ Keba "L'histoire et les objectifs dès l'OHADA" 2004 *Le Quotidien Juridique* 7 (translated as History objectives of OHADA".

OHADA is a system of uniform laws; it is a unified legal system designed to protect and enhance the pro-investment qualities of OHADA laws. It accomplishes this by erecting an entire legislative and judicial structure that formulates and interprets the OHADA laws, and prepares them for enforcement.¹⁰⁹

OHADA may also be described as an international organisation with a legal personality distinct from those of its members.¹¹⁰ As a legal entity, it has the capacity to conclude international contracts.¹¹¹ It is useful to note that OHADA cannot be sued¹¹² but can appear before a domestic court,¹¹³ and it enjoys privileges and immunities in the exercise of its functions in all of the member states.¹¹⁴ The judges of the CCJA enjoy diplomatic immunity, and so do the officials, employees, and the court-appointed arbitrators.¹¹⁵ OHADA is not a federation,¹¹⁶ economic or monetary union,¹¹⁷ but it does possess certain characteristics thereof. OHADA member states have control over their own affairs, but are subject to OHADA for national decisions pertaining to business laws. Although it remains to be seen how anglophone countries might be integrated into OHADA, by virtue of Article 53 of the OHADA treaty, it may be described as a continental organisation that seeks to unify the business law of the African states.

The origins of OHADA can be traced to the signing of the OHADA treaty¹¹⁸ as amended.¹¹⁹ It is worth noting that the OHADA treaty is to be read with the Revised

¹⁰⁹ Dickerson "Harmonising business laws in Africa: OHADA calls the tune" 2005 *Columbia Journal of Transnational Law (Colum.JTL)* 21.

¹¹⁰ Art 47 OHADA treaty. See Pougoue "Présentation General et Procédure en OHADA" 1998 *Presses Universitaires d'Afrique* 6 (translated as General presentation and procedure of OHADA).

¹¹¹ *Ibid*, art 46.

¹¹² *Ibid*.

¹¹³ Art 19 *Rules of Procedure of the Court of Justice and Arbitration* 1998.

¹¹⁴ Art 49 Revised OHADA treaty.

¹¹⁵ *Ibid*.

¹¹⁶ A federation is a group of states that have control over their own affairs but are controlled by a central government for their national decisions; Wehmeier and Ashby (eds) *Oxford advanced learner's dictionary of current English* (2000) 428.

¹¹⁷ Paillusseau "Le droit de l'OHADA: Un droit très important et original" 2004 *Juridis Périodique* 1-2 (translated as "OHADA law: A very important and original law"). A monetary union is one in which "countries agree to pool their monetary sovereignty without necessarily integrating other aspects of trade and economic policy" while an economic union is one in which members move beyond a common market to coordinate and harmonise economic policies; Allan *Regional integration and food security in developing countries* (2003) 7.

¹¹⁸ See Youmis 1997 *Juridis périodique* (n 91) above (hereinafter referred

OHADA treaty. The revised OHADA treaty incorporated significant changes, including: the creation of the fifth institution (Conference of Heads of State and Government);¹²⁰ the creation of four official languages (French, English, Spanish and Portuguese); and the increase of the CCJA judges from seven to nine.¹²¹ The author commends OHADA for its effort and postulates that the new Article 42 will have a far-reaching effect on the membership of OHADA and will encourage other African states to join the organisation. The new Article 42 does not only portray OHADA's effort to integrate English-, Spanish-, and Portuguese-speaking African states into the system, but it is also a laudable step towards the fulfilment of Article 53 of the OHADA treaty.

A significant feature of the OHADA treaty is the opportunity it provides for other African states to join. Article 53 of the OHADA treaty offers every member and non-member of the African Union (AU) the opportunity to join OHADA. To date, the treaty has been ratified by 17 francophone African states.¹²² Ratification is in accordance with the constitutional procedures of the member states.¹²³ Like the constitutions of most of the member states, the Republic of Niger's constitution requires the intervention of the national parliament for its authorisation.¹²⁴ The immediate effects of such ratification are as follows: firstly, it modifies the internal laws of the signatory states; and secondly, it engages the states financially.¹²⁵ In other words, upon ratification, member states are obliged to apply the Uniform Acts and to contribute financially towards the functioning of OHADA institutions.

to as Youmis).

¹¹⁹ See Vilder and Aude 2009 www.blakes.com at 1-3 (hereinafter referred to as Vilder and Aude). See also Lohouse-Oble 2003 www.ohada.com/doctrine/at_1 (hereinafter referred to as Lohouse-Oble).

¹²⁰ It will serve as the supreme institution of OHADA to be chaired by the Heads of State and Government whose country chairs the Council of Ministers (Council); art 27 (1) Revised OHADA treaty.

¹²¹ Ibid.

¹²² See (n 92) above. See also Roseau OHADA 2008 www.ohada.org/etats-parties/membres/post.html/at_1 (hereinafter referred to as Roseau).

¹²³ Art 52 OHADA treaty.

¹²⁴ Art 26 Constitution of the Republic of Cameroon 18 January 1996 (hereinafter referred to as Cameroon Constitution).

¹²⁵ Abarchi 2000 *Revue Burkinabé du Droit* 10 (hereinafter referred to as Abarchi).

Apart from Cameroon, which was colonised by the Germans and then the French and British,¹²⁶ the rest of OHADA's member states were French colonies where consequently, the French imparted their tradition and laws on which OHADA is largely based. Accordingly, French is the official language and Article 42 of the OHADA treaty provides "*Le français est la langue de travail*", meaning that French is the working language of OHADA. This means that the drafting of the Uniform Acts,¹²⁷ the language of instruction at ERSUMA, and proceedings at CCJA and Council meetings are all conducted in French.¹²⁸ The Revised OHADA treaty provides for four official languages: French, English, Spanish, and Portuguese. The treaty further provides that a Uniform Act is first published in French, and then translated into the other languages. This raises the issue of authenticity of the translated versions of the Uniform Acts, but, in the event of conflict between the different translations, the French version prevails.¹²⁹ In respect of Cameroon, constitutional issues have arisen within the jurisdiction.¹³⁰ The incompatibility of the OHADA treaty and the constitution of Cameroon gives rise to the question: Is the OHADA treaty constitutionally valid in Cameroon given its mixed legal system: the civil and common law systems?

2.3 The constitutional validity of the OHADA treaty in Cameroon

Historically, Cameroon was colonised by Germany and then Great Britain and France. France took the larger eastern sector and Britain the smaller western sector, which they administered separately as mandated territories under the League of Nations.¹³¹ Britain transplanted her English common law system in West Cameroon¹³² while France transplanted the civil law system in East Cameroon.¹³³ In 1960,¹³⁴ East Cameroon gained independence as *La République du Cameroon* (Republic of Cameroon). In

¹²⁶ This refers primarily to the North and South West regions of Cameroon.

¹²⁷ Art 63 OHADA treaty.

¹²⁸ Bourque 2002 <http://www.tradeforum.org/news.fullstory.php/aid/497/> at 1-6 (hereinafter referred to as Bourque).

¹²⁹ Art 42 Revised OHADA treaty.

¹³⁰ Tumnde "Harmonisation of business law in Cameroon: Issues, challenges and prospects" 2010 *Tulane European and Civil Law Forum*(*Tul. Eur. & Civ. L.F*) 119–124.

¹³¹ Art 22 *League of Nations*1992.

¹³² The application of the English Common law in West Cameroon is sanctioned by Section (s) 11 of the Southern Cameroon's High Court Law of 1955.

¹³³ The Civil law system in East Cameroon is sanctioned by the *French Decree* of 16 April 1924.

¹³⁴ 1 January 1960.

1961,¹³⁵ West Cameroon joined the Republic of Cameroon to form the Federal Republic of Cameroon made up of West and East Cameroon, with each section maintaining its own legal system.¹³⁶ The historical evolution of Cameroon leaves the legal landscape with two distinct legal systems: the civil law system operating in francophone Cameroon, and the common law system operating in anglophone Cameroon.

By virtue of Article 1(3) of the Republic of Cameroon's constitution, "The official languages of the Republic of Cameroon shall be French and English, both having the same status. The state shall guarantee the promotion of bilingualism throughout the country. It shall endeavour to protect and promote national languages". Article 1(3) lays down the principle of equality of both languages, which involves equal protection and promotion.¹³⁷ This means that any act of parliament, ordinance of the president, treaty or convention, decree, order, or regulation intended to apply throughout the Republic of Cameroon must be made, enacted, printed, or published simultaneously in French and English.¹³⁸ In practical terms, most of the laws of the country are enacted and published in French. An example of such is the presidential decree¹³⁹ appointing the vice-chancellor of the English-speaking University of Buea; although it was a decree appointing an English-speaking Cameroonian, it was issued and published in French only.¹⁴⁰

Business laws fall within the jurisdiction of the legislative power, that is the parliament,¹⁴¹ meaning that the area covered by the treaty is effectively reserved for parliament. However, "with regard to the subjects listed in Article 26 (2) [of the Constitution], Parliament may empower the President of the Republic to legislate by

¹³⁵ 11 February 1961. During the plebiscite of 11 February 1961, West Cameroon which at the time was called Southern Cameroon was given the option to either join the Federal Republic of Nigeria or the Republic of Cameroon.

¹³⁶ Art 46 Constitution of Federal Republic of Cameroon provides: "Previous legislation of the federated states shall remain in force in so far as it does not conflict with the provisions of the Constitution".

¹³⁷ Art 31(3) Cameroon Constitution provides that "laws shall be published in the official gazette of the Republic in English and French".

¹³⁸ Enonchong "The Harmonisation of business law in Africa: Is article 42 of the OHADA treaty a Problem?" 2007 *Journal of African Law (JAL)* 101. See also *The Liquidator, National Produce Marketing Board v Egbe Batuo* 2001 2 Cameroon Common Law Report (CCLR) 185 and 194.

¹³⁹ Decree 2006/441 of 14 December 2006.

¹⁴⁰ Enonchong 2007 *JAL* 102 (hereinafter referred to as Enonchong).

¹⁴¹ Art 26 (1)-(5) *Cameroon Constitution*.

way of ordinance for a limited period and for given purposes”.¹⁴² Article 36 (1) further states that:

The President of the Republic *may* after consulting with the President of the Constitutional Council, the President of the National Assembly and the President of the Senate, submit to a referendum any reform bill which, although normally reserved to the legislative power, could have profound repercussions on the future of the Nation and National Institutions. This shall apply in particular to; inter alia, bills to ratify international agreements or treaties having particularly important consequences.¹⁴³

(Italics are author’s emphasis).

It follows that the President of the Republic of Cameroon may ratify international agreements or treaties within the area of competence of the parliament, but only with the authorisation of parliament. With the power bestowed on the president of the republic,¹⁴⁴ the OHADA treaty was ratified.¹⁴⁵ The question remains whether the treaty establishing OHADA is constitutionally valid in Cameroon. Ayah dismissed the application of the OHADA treaty in Cameroon on the basis that, “a treaty which is basically French suffers from self-exclusion from the English-speaking provinces”.¹⁴⁶ For him, the treaty as well as the Uniform Acts are not applicable in Cameroon, and are thus constitutionally invalid. He further argued that “no piece of legislation can bring in Napoleonic or civil law principles through the back door and even parliament cannot make laws which will abrogate the duality of laws in Cameroon since it was a matter at the heart of negotiations leading to the reunification of the federated states”.¹⁴⁷ The same line of reasoning was adopted in *Limbe Urban Council v Isidore Bongam*¹⁴⁸ wherein the presiding judge of the High Court of Fako Division said: “as to the OHADA

¹⁴² Ibid, art 28 (1).

¹⁴³ Ibid, art 36 (1) (b),

¹⁴⁴ Law 94/04 of 4 August 1994 authorising the President of the Republic of Cameroon to ratify the Treaty in conformity with the Constitution.

¹⁴⁵ Decree 96/177 of 5 September 1996.

¹⁴⁶ *Akiangan Fombin Sebastian v Foto Joseph and Others* suit HCK/3/96 of 6 January 2000 (unreported).

¹⁴⁷ *Tabé-Tabé Company formation under the OHADA uniform Act on Commercial Companies and Economic Interest Groups: Changes in the law hitherto applicable in former west Cameroon* 11-12 (hereinafter referred to as Tabé Tabé).

¹⁴⁸ Suit HCF/E98/IN/99 (unreported).

treaty, I want to point here straightforward that it is not applicable in this part of the Mungo and I find it idle to discuss its effects on this matter”.¹⁴⁹

A summary of Article 42 of the OHADA treaty reveals that the treaty is unconstitutional and therefore cannot be applied in Cameroon, because Article 42 is contrary to Article 1(3) of the Cameroonian constitution. It also violates the educational, justice and employment rights of anglophone Cameroonians guaranteed by international human rights instruments such as the African Charter on Human and People’s Rights,¹⁵⁰ the Universal Declaration of Human Rights,¹⁵¹ and the International Covenant on Civil and Political Rights.¹⁵² These instruments have been signed and ratified by Cameroon, confirming their strong support and respect of fundamental human rights.¹⁵³ In light of the international instruments, the application of the OHADA treaty amounts to domination, discrimination,¹⁵⁴ and marginalisation of the minority anglophone Cameroonians by the majority francophone Cameroonians.¹⁵⁵

The marginalisation of anglophone Cameroon has been criticised¹⁵⁶ and has caused great resentment and resistance by anglophone practitioners who see OHADA as a

¹⁴⁹ Ekome “Landmark developments in commercial law practice in Anglophone Cameroon: Conflicts beyond beliefs” 2002 *Juridis Périodique* 86.

¹⁵⁰ Evans and Murray (eds.) *The African Charter on Human and Peoples’ Rights: The system in practice 1986–2006* (2008) 1-6. Art 1 of the *African Charter on Human and Peoples’ Rights 1981/1986* (hereinafter referred to as the African Charter) provides: “the member states of the organisation of the African Union (AU) parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them”. The same Charter further provides in art 2 that “every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”. Art 7(1) (a) of the Charter provides that “every individual shall have the right to have his cause heard. “This right to an appeal to competent national organs against acts violating his fundamental rights is recognised and guaranteed by the conventions, law regulations and custom in force”. Sohn *International organisations and Integration* (1986) 1060-1075 provides the full text of the African Charter.

¹⁵¹ 10 December 1948. Art 2 provides “Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status”.

¹⁵² 7 July 1994.

¹⁵³ Art 65 Cameroon Constitution.

¹⁵⁴ Lerner *Group Rights and discrimination in international law* (1991) 23-37. The author outlines the different forms of discrimination.

¹⁵⁵ Art 19 *African Charter* provides “all people shall be equal; they shall enjoy the same respect and shall have the same rights”.

¹⁵⁶ Gwellem ‘Anglophone lawyers say OHADA treaty cannot apply in Cameroon’ *the Star Headline*, 18 June 2001 at 1. See Njoya “OHADA treaty- An Unruly Horse” 2003 *Cameroon Common Law*

form of domination and an instrument to undermine the valued common law of the provinces. The following examples illustrate anglophone Cameroonians' grave resentment towards and reluctance to apply the Uniform Acts. In *Meme lawyers association v Court registrars of Kumba*,¹⁵⁷ a group of anglophone lawyers demonstrated their resentment against the extension of a ministerial circular¹⁵⁸ to anglophone Cameroon. In terms of the circular, a claimant is required to pay a fee of five percent of the amount of his claim before the claim can be listed for hearing. In response to this circular, the group of lawyers brought an action before the High Court of Kumba seeking a declaration that the ministerial circular was unconstitutional and illegal in that part of the country.¹⁵⁹ The High Court ruled in favour of the lawyers to the effect that it is illegal to collect five percent of a claimant's amount as condition precedent for filing.

Some judges in anglophone Cameroon are reluctant to apply the Uniform Acts. The case of *Mariner Max and D.M Ltd v Dumas Jean Raymond*¹⁶⁰ is a telling example that involves mismanagement, fraud, and misappropriation of a company's fund by the defendant (Raymond), a director, and shareholder of the company.¹⁶¹ The applicants (D.M. Ltd) sought a restraining order against the defendant on the following terms:

An order restraining the defendant from exercising the functions of director or any other administrative or supervisory functions whatsoever in regard to the affairs of the company; to hand over all key documents of title, records of accounts, money and other objects which were the property of the company and from interfering with the day to day business of the company or from visiting the premises of the company save for the purpose of inspecting documents of accounts.¹⁶²

Journal 20 and Tabe-Tabe "Some antipodal hurdles that beset the uniform working of the OHADA uniform Acts in Cameroon" 2002 *Presses Universitaire d'Afrique* 33.

¹⁵⁷ (2001) 1 CCLR 11

¹⁵⁸ Circular 00012MJ/SG/DAG OF 13 May 1996.

¹⁵⁹ Enonchong (n 140) 111.

¹⁶⁰ 36/OM/2000 - 2001 (unreported).

¹⁶¹ Tabe-Tabe (n 147) 9-10.

¹⁶² *Ibid.*

The trial judge, Ngie Albert Ngangjie, gave his judgment¹⁶³ in reference to the provisions of Article 326 of the Uniform Act relating to the Commercial Companies and Economic Interest Group (Companies Act)¹⁶⁴ and the Companies Ordinance of 1958 applicable in that part of the country. On appeal, his judgment was revised without reference to any provision of the Uniform Act. Similarly, in *Ngu Chang Celestin and Barrister Mba Godwill v Celestin Asangwe & 50 others*,¹⁶⁵ the Uniform Act on Debt Recovery and Enforcement Measures¹⁶⁶ was set aside for law 92/008 of 14 August 1992¹⁶⁷ relating to the execution of court judgments in anglophone Cameroon, on the basis that it was not the applicable law in that part of the country.¹⁶⁸

Since the OHADA treaty infringes on the constitutional and human rights of anglophone Cameroonians, the question was whether it could be declared unconstitutional by the Cameroonian Constitutional Council. Based on Article 1(3) of the constitution, the Constitutional Council can declare the OHADA treaty unconstitutional. However, the government of Cameroon cannot invalidate its consent to be bound by the OHADA treaty on the basis that it is in violation of its internal laws,¹⁶⁹ because the treaty was duly approved by the parliament and ratified by the president, giving the treaty the force of international law in the country. This is supported by Article 46 of the constitution which provides: “duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement”.

¹⁶³ Some of which include subjecting the manager to insolvency or criminal proceedings in accordance with the criminal law of Cameroon; art 185 *Uniform Act Organising Collective Proceedings for Wiping Off Debts* 1999 (hereinafter referred to as Insolvency Act).

¹⁶⁴ Art 326 Companies Act provides: “Manager(s) appointed in the Articles of Association or not may be removed from office by decision of the partners representing more than half of the company shares. Any provisions to the contrary shall be deemed to be unwritten. Where such removal from office is decided without any just reason, it may give rise to the payment of damages. Besides, the manager may be dismissed by the commercial court within whose jurisdiction the company's registered office is located, for a just reason at the request of any partner”.

¹⁶⁵ 59/1992 - 2000 (unreported).

¹⁶⁶ *Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution* 10 April 1998. (translated as Uniform Act on Simplified Recovery and Enforcement Measures).

¹⁶⁷ It is amended by Law 97/018 of 7 August 1997.

¹⁶⁸ Ekome 2002 *Juridis Périodique* 86-88 (hereinafter referred to as Ekome).

¹⁶⁹ Arts 46 and 48 *Vienna Convention* 1945.

The validity of the treaty is also based on the fact that no threat was used against the president of Cameroon to secure its consent,¹⁷⁰ which implies that the treaty is legally binding on Cameroon in accordance with the principle of *pacta sunt servanda*.

Articles 43 and 47 (3) of the constitution also seem to suggest that the OHADA treaty is valid and applicable in Cameroon. Article 43 provides:

The president of the Republic shall negotiate and ratify treaties and international agreements. Treaties and international agreements falling within the area of competence of the legislative power as defined in article 26... of the constitution shall be submitted to parliament for ratification.

On the other hand, Article 47 (3) of the Constitution provides: "Laws as well as treaties and international agreements may, prior to their enactment, be referred to the Constitutional Council". It follows therefore, that after the enactment or ratification of a law or treaty, it cannot be questioned or challenged before the Constitutional Council, which indicates that the OHADA treaty is valid and constitutional. Thus, anglophone Cameroonians cannot appeal against the fact that the president has not complied with the constitutional requirements as justification for non-compliance with the treaty.¹⁷¹

Despite the verdict in anglophone Cameroon referred to above, the OHADA treaty and the Uniform Acts are constitutionally valid and applicable in Cameroon. Tumnde¹⁷² acknowledged the efforts made by the courts and legal practitioners of anglophone Cameroon in understanding and applying the laws. In *Amity Bank Cameroon Plc v Lawrence Loweh Tsaha*,¹⁷³ Loweh, general manager and chairman of the Bank was dismissed by the board of directors on the basis of Article 22 of the Companies' Articles of Association¹⁷⁴ and Articles 469¹⁷⁵ and 492¹⁷⁶ of the Companies Act. On appeal to the

¹⁷⁰ Ibid, art 51.

¹⁷¹ Ibid, art 27.

¹⁷² Cited in Akwanga 2006 http://www.leffortcamerounais.com/2006/01/the_ohada_law_k.html at 1-3(hereinafter referred to as Akwanga).

¹⁷³ Suit HCF/59/92-2000 (unreported).

¹⁷⁴ The article empowered the board of directors of the bank with the power to appoint and dismiss the managing director and deputy managing director.

¹⁷⁵ "The chairman and managing director may be dismissed at any time by the board of directors".

¹⁷⁶ "The general manager may be dismissed at any time by the board of directors".

High Court of Fako, the dismissal was upheld by the court because it was done in accordance with the law.¹⁷⁷

2.4 The benefits of OHADA's regulatory and institutional framework

As much as OHADA aims to improve the legal environment for business, the harmonisation process should be seen as a “technical tool” of economic integration with several advantages.¹⁷⁸ The principal advantage lies in OHADA's creation of a secure legal environment for its member states and investors. Before 1993, there was a combination of different laws, many of which were outdated, dating back to the 19th century. As a consequence, investors wanting to invest in the region encountered numerous difficulties in trying to understand different legal traditions, for which very little literature existed.¹⁷⁹ OHADA has eradicated this impediment by issuing modern commercial laws¹⁸⁰ that now govern many commercial aspects.

Member states are provided with modern commercial laws which are accessible through publications in the OHADA Official *Gazettes*, the International Law Institute of French Expression and Inspiration's annotated Code,¹⁸¹ as well as on the website www.ohada.com. The website is operated by the African Association for a Unified System of Business Laws in Africa (UNIDA).¹⁸² Through the website, the Uniform Acts, the judgments, and advisory opinions of the CCJA, have been published. The merits of the Uniform Acts are evident in the assistance they provide in the identification of applicable laws, the limitation of legal conflicts and the encouragement of cross-border transactions among member states.

¹⁷⁷ Supra (n 173) above. See arts 469 and 492 *Companies Act*.

¹⁷⁸ Mouloul 2009 www.ohada.com at 12 (hereinafter referred to as Mouloul).

¹⁷⁹ Allen *Legal aspects of doing business in black Africa* (1981) 19.

¹⁸⁰ Lang 2005 <http://www.bowman.co.za/lawArticles/Law-Article-id-902854040.asp> at 1 (hereinafter referred to as Lang).

¹⁸¹ *Institut International de Droit d'Expression et Inspiration Française* (IDEF) (translated as the International Law Institute of French Expression and Inspiration).

¹⁸² It is located in Paris and is charged with the publication of the OHADA uniform Acts.

According to Paillusseau,¹⁸³ “the unity of the applicable rules will facilitate the operation, the legal organisation, functioning and commercial trade of a company that operates in several countries”. Economic operators (investors) are now free to conduct business in the region, and to transfer assets in the event of insolvency at a reduced (legal and transactional) cost. The 2012 Doing Business Report shows a decrease in the average cost of doing business, from 110% to 38% of the average per capita income across the OHADA region, and a decrease in the time required to register a property.¹⁸⁴

The Senegal power plant project, the Chad-Cameroon oil project,¹⁸⁵ the Manantali Dam in Mali, and the Azito power plant in Côte d’Ivoire¹⁸⁶ are examples of large-scale operations between different OHADA member states and are largely structured based on OHADA rules.¹⁸⁷ OHADA rules have made it possible to extract the Doba basin oil deposits in southern Chad.¹⁸⁸ The Uniform Acts provide clarity and better understanding of the laws and also help to avoid confusion and duplication. Another benefit is the improvement of the reliability of the judicial systems within the member states through the creation of the CCJA. The consequence is that investors have legal and judicial certainty in the interpretation of the laws and settlement of contractual disputes, and, hence, investment is promoted.

Considering the benefits to be derived from a unified business law, many African leaders have agreed on the extension of the OHADA initiative in their respective countries. While the Democratic Republic of Congo (DRC) has ratified the OHADA treaty,¹⁸⁹ Cape Verde, Djibouti, Ethiopia, Madagascar, Mauritania, Mauritius, Rwanda, Sao Tome, Burundi,¹⁹⁰ Nigeria, Ghana, Liberia, and Angola have expressed their

¹⁸³ Paillusseau 2004 *Juridis Périodique* 3-5 (hereinafter referred to as Paillusseau).

¹⁸⁴ WB Report 2012 (n 43) above.

¹⁸⁵ Norton 2008 www.businessenvironment.org/dyn/be/docs/152/cousin20%-english%20version.pdf at 1 (hereinafter referred to as Norton).

¹⁸⁶ Martor “The OHADA legal harmonisation process: The benefits for Africa’s development” 23 (2003, unpublished and on file with author).

¹⁸⁷ Andy 2002 www.ohada.com at 1 (hereinafter referred to as Andy).

¹⁸⁸ Ibid.

¹⁸⁹ Ademola “Community laws in international business transactions” (n 73) above (hereinafter referred to as Ademola).

¹⁹⁰ Walsh *In search of success: Case studies in justice sector development in Sub-Saharan*

interests to join OHADA.¹⁹¹ These are signs of confidence in the OHADA initiative. Despite the achievements and benefits outlined above, OHADA, like other regional integration efforts in Africa, has some temporary drawbacks that may become permanent if no effort is made to overcome them.

2.5 Problems in the OHADA system and the way forward

OHADA faces a number of problems that have undermined its ability to develop standardised and pan-African business laws.¹⁹² In the main, OHADA suffers from the problem of incomplete integration, gaps in the regulatory framework, and implementation.

2.5.1 Incomplete integration challenge

The notion of business law encompasses all branches of business law such as insolvency law and contract law. OHADA does not cover all aspects of business law and to date, there is no Uniform Act relating to mergers and acquisition, investment, or contract and employment (there are draft laws on contract and employment that are yet to be implemented). This leads to the co-existence of modern laws and outdated national laws, and while an investor enjoys the benefit of modern laws in relation to many aspects of his investment, he may find some aspects still governed by outdated national laws¹⁹³ such as the determination of exempted assets in the event of a seizure.¹⁹⁴ The determination of the amount of a wage claim to be paid to an employee in the event of insolvency is also left to the member states, as are criminal provisions relating to Uniform Acts and the payment of interest when a party fails to pay the contract price agreed for a commercial sale.¹⁹⁵

Africa (2010) 43.

¹⁹¹ Igbanugo and Adiyia 2009 <http://www.igbanugolaw.com/news/the-harmonisation-of-business-law-in-africa-fact-or-fantasy.html> at 1 (hereinafter referred to as Igbanugo and Adiyia). See also Akin 2008 (http://www.ohada.com.infohada_detail.php?article=953; accessed 21 March 2012).

¹⁹² Beauchard and Kodo, *Can OHADA increase legal certainty in Africa?*, Justice and Development, Working Paper Series (2011) 16 (hereinafter referred to as Beauchard and Kodo).

¹⁹³ Pilkington (n 10) 30.

¹⁹⁴ Art 50 *Uniform Act on Debt Recovery and Enforcement Act*. See also arts 49 (2) and 122 of the said Act.

¹⁹⁵ Arts 263 *Uniform Act on General Commercial Law 2010*. A defaulting party will be exonerated from

The co-existence of Uniform Acts and national laws creates legal uncertainty, which, according to Tiger, is “an uncertain situation related to the result of an eventual procedure in which the traders could be involved in as a party, and its inability to influence the course of justice in the sense of fairness if necessary”.¹⁹⁶ The problem of incomplete integration is however temporary because OHADA continues to legislate, and there are hopes for future Uniform Acts on employment, sales law, and other matters.¹⁹⁷

It should be noted that although a successful extension of the Uniform Acts might help solve the problem of the conflict of laws, it could constitute a major threat to other regional organisations. For example, the harmonisation of investment law will be a major threat to the Economic and Monetary Community of Central African States (CEMAC).¹⁹⁸ In order to overcome the challenge of conflict of laws between the different regional bodies, it is vital for regional bodies to collaborate in the harmonisation of laws in Africa.

2.5.2 Gaps in the regulatory framework

The Insolvency Act is silent on insolvency disputes between a member state and a third-party state. This arises when a debtor maintains branches in countries other than the member state. In response to this situation, Article 4 of the Insolvency Act stipulates that: “where the head office is located abroad, the collective proceedings shall be before the court within whose jurisdiction the main operation centre situated on the national territory is found”. This provision does not remedy the situation.

There is no framework on the appointment of persons (known as “administrators” in the case of a business rescue, and “liquidators” in the case of a defunct company)¹⁹⁹

liability if such failure is due to an impediment beyond his control, such as act of a third party or force majeure; art 267 *General Commercial Law* 2010.

¹⁹⁶ Tiger “Que sais-je? Le droit des affaires en Afrique-OHADA” 1999 *Presses Universitaire Afrique 2* (translated as “What do you know? Business law in Africa”).

¹⁹⁷ The Council Decision 002/2001/CM of 23 March 2001.

¹⁹⁸ The Economic and Monetary Community of Central African States (CEMAC) already has an Investment Charter 20-cm-039 of 17 December 1999.

¹⁹⁹ Only judges are appointed administrators and liquidators. This is after completion of a two year

responsible for the administration of insolvent estates. This is open to abuse and may lead to corruption or nepotism, on the grounds that persons may be appointed simply because they are related to the president of the competent court. It should be made clear that only a government official may be appointed by the competent commercial court. In principle, the president of the competent court selects, appoints, and supervises the insolvency practitioner in the execution of his/her duties as prescribed in the Insolvency Act. Added to this is the uncertainty about practitioners' remuneration. However, the question arises as to whether or not the practitioners are entitled to commission or a salary.²⁰⁰

The Insolvency Act is silent on these latter points and the matter is left to the member states to decide. In *Taranga Company v Abdoulaye Drame*,²⁰¹ in dealing with this problem of fixing an administrator's remuneration, the Appeal Court of Dakar, set the remuneration in accordance with the number of hours spent by the administrator in conducting the administration proceedings. It makes sense, that Senegal adopts a time-based remuneration system, paying administrators in accordance with the time spent on a specific estate.

To bridge these gaps, reference could be made to the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency (Legislative Guide), and Model Law on cross-border insolvency (Model Law).²⁰² A detailed exposition of the Legislative Guide and Model Law will not be given here. Based on the complexity of insolvency proceedings, it is recommended that the insolvency practitioner is an appropriately qualified person with the experience, legal knowledge, and experience and/or knowledge in finance, business, and accounting laws.²⁰³ In this

²⁰⁰ course at the National School of Administration and Magistracy (ENAM).
In terms of art 20 of the insolvency Act, "remuneration of a receiver in the capacity of assignee is determined by the court that appointed him".

²⁰¹ Judgment 26/2001 of 27 April 2001.

²⁰² UNCITRAL Legislative Guide 2004 ([the "Practice Guide"](#)) (hereinafter referred to as the Legislative Guide) and [the UNCITRAL Model Law on Cross-Border Insolvency](#) 1997 (hereinafter referred to as the Model Law). Available at http://www.uncitral.org/uncitral_texts/insolvency.html at 1.

²⁰³ UNCITRAL Legislative Guide 175 paras 39.

regard and in the light of the international benchmarks mentioned above, the author suggests that:

- the appointment of only qualified persons, that is, persons with the relevant qualifications obtained from a recognised institution, such as ERSUMA,²⁰⁴ the National Schools of Administration and Magistracy (ENAM), or any recognised professional body;
- the appointment of persons with legal knowledge;
- relevant experience in the area of law (five years' experience); and
- an association to be created called the Association of Insolvency Practitioners within the OHADA region (AIP-OHADA) of which practitioners must be members. As members, they should be required to pay a membership fee.

Regarding the administrators and liquidators' fees, a commission-based system should be developed²⁰⁵ and administrators and liquidators should be entitled to commission for services rendered. The system should not be considered in isolation and factors such as time spent in administering the estate,²⁰⁶ and the complexity and value of assets dealt with, should also be taken into account.²⁰⁷ Additionally, in order to encourage dedication to work, the commission that administrators and liquidators receive, should be distinct from the salary they receive as employees of the state. In respect of the fee amount, the president of a competent court, or the body of creditors should be empowered to establish administrator and liquidator fees.²⁰⁸

With regard to Article 4 above, it is imperative for OHADA drafters to incorporate Articles 25 to 27 of the Model Law and Legislative Guide to Enactment.²⁰⁹ These provisions will help to ensure co-operation in proceedings between OHADA member

²⁰⁴ This would mean an extension of the role of ERSUMA to the training of insolvency practitioners.

²⁰⁵ Legislative Guide 181 paras 53.

²⁰⁶ Judgment 26/2001 of 27 April 2001.

²⁰⁷ Cronje *Study Notes: Diploma in Insolvency Law and practice* University of Pretoria 277.

²⁰⁸ Symes *Statutory priorities in corporate insolvency law: An analysis of preferred creditor status* (2008) 101-104.

²⁰⁹ The United Nations Model Law on Cross-Border Insolvency Guide to Enactment 30 May 1997. Arts 25 and 26 *Model Law* deals with cooperation and direct communication between a court of a state and foreign courts or foreign representatives.

states and a non-contracting state. The Model Law does not change the internal laws of member states, but provides methods that enable courts to communicate directly with one another. Article 27 of the Model Law provides for the following forms of co-operation that may be adopted by the drafters of OHADA:²¹⁰

- appointment of a person or body to act with the foreign representative;
- communication of information by any means appropriate; and
- approval or implementation by the courts of the agreement regarding the co-ordination of proceedings and co-ordination of concurrent proceedings regarding the same debtor.

2.5.3 Interpretation challenge

The harmonisation of business law in Africa dictates that other legislative views and cultures should be considered.²¹¹ Regrettably, the OHADA harmonisation process only reflects the views and cultures of its francophone states, and Articles 42 and 63 of the OHADA treaty attest to this deficiency. Based on the differences in legal education and training in francophone and anglophone Cameroon, the judges approached the question of statutory interpretation differently, which, according to Tabe-Tabe²¹² hinders the uniform interpretation and application of the Uniform Acts in Cameroon. In francophone Cameroon, as in France, judges rely on the grammatical, logical, historical, and teleological approaches to the interpretation of statutes.²¹³ On the other hand, in anglophone Cameroon, like its counterparts in England and other anglophone countries, the judges rely on rules of construction, such as the literal rule, the golden rule, the mischief rule, and the *ejusdem generis* rule, to interpret statutes.²¹⁴

²¹⁰ Elliot and Griffins “UNCITRAL Practical Guide on Cross-Border Insolvency Practice” 2010 *Corporate Rescue and Insolvency* 12-14.

²¹¹ Saadani “Communication: OHADA, a continent-wide perspective” 2008 *Uniform Law Review (Unif. L. Rev)* 486.

²¹² Tabe-Tabe (n 147) 18. See Germain “Approaches to statutory interpretation and legislative history in France” 2013 *Duke Journal of Comparative and International Law* 195-206.

²¹³ See Anyangwe “Introduction to Law and Legal Systems” 1983 *University of Yaoundé Polycopy* 290-294 for a discussion on the methods of statutory interpretation in Francophone and Anglophone Cameroon.

²¹⁴ Tabe-Tabe (n 147) 9-10.

The case of the *Bank of England v Vagliano Brothers*²¹⁵ is the authority on the interpretation of statutes in common law. In this case, Lord Herschelle observed as follows:

I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood and then assuming that it was probably intended to leave it unaltered to see if the words of the enactment will bear an interpretation in conformity with this view...²¹⁶

This suggests that a judge can interpret a statute or treaty only if he has a mastery of the language used in constructing the statute or treaty. The lack of awareness due to either the language barrier, or OHADA's inability to disseminate the laws, has made it difficult for anglophone judges and magistrates to interpret the Uniform Acts and the treaty. As a consequence, anglophone lawyers and judges have been reluctant to refer their cases to the CCJA, fearing that they may be challenged because of the inconsistency between the English and the French.²¹⁷ The truth is that most of the people are unaware of the laws. Dickerson cited the case of a Cameroon judge who only became aware of OHADA from a lawyer pleading a case before her,²¹⁸ while Kanté²¹⁹ cited the case of Niger where some judges and lawyers continued to apply the former companies' law of the country, despite the entry of the OHADA Companies' Act.

This problem of interpretation is compounded by the lack of a definition section in the Uniform Acts, which makes it difficult for readers to ascertain the precise meaning of terms used. Consequently, the CCJA has, in some cases, declined its competence because of incorrect interpretation of the law. The case of *SOCOM SARL Ltd v*

²¹⁵ (1891) Appeal Court 107.

²¹⁶ Tabe-Tabé 2002 *Presse Universitaire d'Afrique* 41 (hereinafter referred to as Tabe-Tabé).

²¹⁷ Tabe-Tabé (n 211) above. See Eyike "Le Droit International Devant le Juge Camerounaise: Regards d'un Magistrat" 2005 *Jurisdic Périodique* 100-106 (translated as "International law before a Cameroonian judge: Views of a magistrate").

²¹⁸ Dickerson 2005 *Colum.JTL* 59 (hereinafter referred to as Dickerson).

²¹⁹ Kanté "Le Domain d'Application du Nouveau Droits des Sociétés Commerciale de l'OHADA" 2002 *Annales de la Faculté de Droit de Dschang* 4 (translated as "Domain of application of the new law relating to commercial companies").

SGBC,²²⁰ illustrates the problem of language where the CCJA declined its competence on the grounds of misinterpretation of Article 32 of the Uniform Act on Debt Recovery and Enforcement Measure. To a large extent, the language and court procedure have strongly militated against anglophone lawyers pleading their cases before the CCJA.²²¹ Inasmuch as countries do not want to be left out of any reform process, they cannot apply laws in a language that they do not understand. This problem must be attended to if the fears of sceptics are to be allayed.

Efforts are underway towards increasing awareness of the laws. In Benin, the Millennium Challenge Corporation (MCC) recently funded the training of all Beninese judges and a significant proportion of court registrars at ERSUMA, as well as the purchase of the laws and scholarly analysis for all trainees.²²² The Uniform Acts have also been translated from French into English, Portuguese, and Spanish,²²³ but scholars have criticised the translations, stating that they are “literal, inadequate, and nebulous”.²²⁴ One of the regrettable translations is Article 3 (2) of the Uniform Act on Security in terms of which a surety-bond is defined as a “contract in which the guarantor undertakes, to perform the debtor’s obligation in the event of default by the latter”.²²⁵ As a contract between the creditor, guarantor and debtor, it must be contracted with the knowledge of the parties. The English translated version states that the contract cannot be contracted without the creditor’s authority or knowledge.

Even though it is a risk for non-French-speaking countries to rely on the translated versions of the Uniform Acts, these versions do at least provide an understanding of the laws.²²⁶ It is equally worth noting that a draft code is currently being drafted in English and Chinese in order to attract Chinese investors. Zhu²²⁷ points out that the adopted

²²⁰ CCJA judgment 014/2003 of 19 June 2003.

²²¹ Ibid.

²²² Beauchard and Kodo (n 192) 28.

²²³ Thouvenot “News on the development of the organisation for the harmonisation of business law in Africa (OHADA)” 2006 *International Business Law Journal (IBLJ)* 4.

²²⁴ Tumnde 2010 *Tul. Eur. & Civ. L.F126* (hereinafter referred to as Tumnde 2010).

²²⁵ Tumnde *et al* “Uniform Act Organising Securities (Guarantees)” 2007 *Jurisclope* 5.

²²⁶ Muna 2001 *International Law Forum* 10-11 (hereinafter referred to as Muna).

²²⁷ Zhu “OHADA: As a base for Chinese further investment in Africa” 2009 *Penant* 422.

laws have enabled Chinese investors to make full use of their provisions, and to expand their business in Africa. The Department of Western Asian and African Affairs reports that “among the top 20 Africa countries of the China-Africa trade, there are 14 OHADA member states, five of which come into top ten of the China-Africa trade”.²²⁸ The expansion of Chinese investment into Africa is attributed to a number of reasons, one of which relates to the similarity in the legal culture – civil law tradition between OHADA francophone states and China.²²⁹ The second reason is that the commercial laws of OHADA and China are influenced by the French modern commercial laws.²³⁰ Thirdly, both systems emphasise the role of arbitration in resolving commercial disputes.²³¹

It is suggested that more effort should be made to educate Africans on the existing laws through seminars, conferences, and training. It is worth noting that legal practitioners of anglophone Cameroon are increasingly receiving training on the Uniform Acts.²³² In order to avoid the problem of translation Tumnde suggested co-drafting of future Uniform Acts, and recommended a co-revision team to revise existing Uniform Acts to clarify the misunderstanding of legal jargons and technical terms.²³³ It is submitted that a co-drafting process should be performed according to the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts (UNIDROIT Principles),²³⁴ to suit the African legal peculiarities in the incorporation of the diverse legal systems. This will no doubt obviate any confusion that may arise, and thus foster a better understanding of OHADA’s objectives in the rest of the world.

²²⁸ See (<http://xyf,mofcom.gov.cn/aarticle/date/200905/20090506224130.html>; accessed on 22 October 2011). The 14 countries are Congo, Benin, Ghana, Togo, Gabon, Cameroon, Equatorial Guinea, Senegal, Guinea, the Côte d’Ivoire, Niger, Mali, Chad and Burkina Faso, while the top five are Congo, Benin, Ghana, Togo and Gabon.

²²⁹ There is similarity in the legal concepts, education, procedure in the civil law jurisdictions and in turn avoids unnecessary loses that might result from the understanding of the Uniform Acts.

²³⁰ Zhu 2009 *Penant* 426 (hereinafter referred to as Zhu).

²³¹ Samassekou and Song “Effectiveness and remedies of arbitral awards in OHADA’s system and the People’s Republic of China” 2011 *Journal of Politics and Law* 63-72. He highlights the similarities between OHADA arbitration rules and those of the People’s Republic of China.

²³² Akwanga (n 171) above.

²³³ Tumnde “The applicability of the OHADA treaty in Cameroon: Problems and prospects” 2002 *Presses Universitaire d’Afrique* 23-32.

²³⁴ 1994.

The preliminary draft Uniform Act on contract law is a significant step in OHADA's attempt to establish a truly harmonised rule, because it follows the pattern of UNIDROIT Principles.²³⁵ The African Development Bank believes that through further contact and discussion with African anglophone countries, the OHADA initiative could be easily extended into these countries, and achieving its goal of regional integration.²³⁶

2.5.4 Institutional challenge

Although the institutions are well established, there is a lack of finance and staff with adequate knowledge of the Uniform Acts and training to discharge their function effectively. Funding remains a big hurdle for OHADA and its institutions in general. The OHADA treaty requires each member state to contribute to the functioning of OHADA,²³⁷ but the contributions have proven insufficient, leaving the institutions underfunded. A capitalisation fund of 12 billion CFA²³⁸ has also been created,²³⁹ and is expected to cover the operating costs of the OHADA institutions for a ten-year period.²⁴⁰ In addition, a community tax of half a percent has been approved on imported goods from third party states,²⁴¹ and although it is not yet in force, the idea seems promising. There is a training school for legal officers located in Porto-Novo, Benin, but because of budgetary constraints, it falls short of the needs of trained lawyers and magistrates to conduct court proceedings in English. In this regard, ERUSMA offers trainings at a fee to sustain its programmes.

The CCJA faces the most important challenges due to the lack of finance and staff to handle the constant increase in caseloads. The anglophone judges have also been reluctant to refer cases to the CCJA because the practice and procedure of the court are civil law oriented, and because of the inconvenience and cost to non-Ivorians in

²³⁵ Date-Bah "The preliminary draft OHADA uniform Acts on contract law as seen by a common law lawyer" 2008 *Uniform Law Review* 217-222.

²³⁶ See African Development Bank support to OHADA available at: http://www.ohada.com/infohada_details.php?article=584; accessed 5 September 2011.

²³⁷ Art 43 (1) OHADA treaty. See also Decision 004/2004/CM of 27 March 2004.

²³⁸ The 12 billion is equivalent to 193,443,793.36 South African Rands.

²³⁹ Aregba 1999 www.ohada.com at 47–48 (hereinafter referred to as Aregba).

²⁴⁰ Ibid.

²⁴¹ See Rule 002/2003 relating to OHADA autonomous financing mechanisms—OHADA Official Journal 14 of 20 December 2003.

pleading their cases before the court.²⁴² The truth is that most Cameroonian cases referred to the CCJA are from the French-speaking regions,²⁴³ for examples: the *Industrial and commercial company of Cameroon (SOCINCAM) v Peter Meunier Company of Cameroon*,²⁴⁴ and *Michel Ngamko v Guy Deumany Mbouwoua*.²⁴⁵ The question often asked is what would happen to a case that is referred to the CCJA by anglophone Cameroon? Undoubtedly, such a case will be sent back to the English court from which it arises. This indicates that litigations from the English-speaking parts find their terminal point at the National Appeal Courts²⁴⁶ depriving anglophone Cameroonians of their fundamental right to justice.

As a way forward, it is submitted that common law judges from anglophone countries should be trained in OHADA law to cater for cases from anglophone Cameroon and other English-speaking countries.²⁴⁷ For *Tabé-Tabé*,²⁴⁸ the training of judges from anglophone countries “will encourage anglophone lawyers to appeal to the CCJA and to represent clients there”. Article 19 of the CCJA Rules of Procedure was adopted to address the problem of location.²⁴⁹ In terms of Article 19, “the seat of the court shall be in Abidjan. However, the court *may*, if it deems necessary to meet in other places on the territory of any member state with the prior consent of such state which shall under no circumstances be involved financially”.²⁵⁰ The emphasis is on *may*, which means that the court is not a mobile court per se, and that the assembly of the court in other member states is upon the discretion of the court. Exacerbating this issue is that Article 19 does not state the conditions or circumstances under which the court may deem it necessary to move. This is one aspect of the law that must be clearly defined.

²⁴² Saadani 2008 *Unif.L.R* 487 (hereinafter referred to as Saadani).

²⁴³ *Tabé-Tabé* (n 147) 21.

²⁴⁴ CCJA judgment 005/2002 of 10 January 2002.

²⁴⁵ CCJA judgment 006/2002 of 21 March 2002.

²⁴⁶ *Tabé-Tabé* (n 243) above.

²⁴⁷ Tumnde 2002 *Presses Universitaire d’Afrique* (n 232) above (hereinafter referred to as Tumnde 2002) .

²⁴⁸ *Tabé-Tabé* (n 147) 22.

²⁴⁹ See art 19 (n 113) above.

²⁵⁰ Emphasis added.

Tumnde²⁵¹ suggested the establishment of a circuit court, or a permanent court in each of the member states. Tumnde believes this will bring “the court nearer to the people and would allay the fears of poor litigants or lawyers”. The danger of establishing a permanent court in each state is that it is likely to give rise to different interpretations, which in turn defeats the very purpose of uniformity. Even though the establishment of a circuit court would be costly for the organisation, it seems to be the most appropriate alternative. Another suitable alternative would be to train judges from each of the member states who will appeal to the CCJA and represent clients there. This calls for equal representation by the judges at the CCJA.

According to Kruger,²⁵² “a practical necessity for the efficacy of regional dispute settlement bodies is workable and reliable enforcement mechanisms”. OHADA has a Uniform Act on Debt Recovery and Enforcement, which is a lengthy legislation divided into two parts. The first part contains two major procedural possibilities: the traditional order to pay procedure, and the more innovative order procedure of restitution of goods. The second part contains simplified enforcements and rules of protective seizure of goods, movables, and immovables.²⁵³ The CCJA’s publication of its decisions and detailed references have increased transparency, but many local professionals still acknowledged that the transparency promoted by CCJA has not eradicated corruption in the national judicial systems.²⁵⁴ This is seen in the lack of predictability in the execution of judgement when local authorities are called to execute a judgement or an arbitral award. However, in order to move away from such a problem, it is proposed that OHADA advocate the transfer of sovereignty to the point of establishing a uniform method of enforcement.²⁵⁵ While such promotion will not be an easy task, it must be remembered that any reform, whether judicial or legal, must start somewhere.

²⁵¹ Tumnde 2002 (n 247) 29.

²⁵² Kruger “Regional organisations and their dispute settlement bodies” 2008 *De Jure* 318.

²⁵³ Ibid.

²⁵⁴ Beauchard and Kodo (n 192) above.

²⁵⁵ At present, only Senegal, Côte d’Ivoire, Guinea, Guinea Bissau and Gabon have legislation on the recognition and enforcement of foreign judgments. See Meyer “La Sécurité Juridique et Judiciaire dans l’Espace OHADA” 2006 *Revue Penant* 151 (translated as “Legal and judicial security within the OHADA space”).

2.6 Conclusion

Prior to 1993, Legal diversity was a major challenge to the economic development of the African states of the Franc zone. As earlier mentioned the legal diversity resulted in legal uncertainty regarding the applicable laws and incurred unnecessary costs to cross-border business transactions, considerably harming investment prospects in the zone.²⁵⁶ In a bid to attract foreign investors and to foster the development of African countries, OHADA was established by the treaty on the harmonisation of business laws in Africa. As mentioned above, OHADA is designed to create a single economic space for Africa through the creation of supranational institutions and the preparation and adoption of Uniform Acts.²⁵⁷ It is evident from the foregoing that OHADA has standardised the business laws of its member states. It replaces the national business laws with a communal law, thereby creating a stable and conducive business environment for investors doing business in the franc zone.

Considering the benefits to be derived from a unified business law, many African leaders have agreed on the extension of the OHADA initiative in their respective countries.²⁵⁸ Despite the achievements and benefits outlined above, OHADA, like other regional integration efforts in Africa, has some temporary drawbacks that may become permanent if no effort is made to overcome them, one of which is the problem of incomplete integration. In view of the above, it is submitted that if the problems inherent in the current system are given due consideration, the prospect of a unified business law for Africa will become a real possibility, and the unity will act as impetus to significant foreign investment in the continent.²⁵⁹ While significant strides have been made towards making OHADA a project for the benefit of all Africans, it is argued that it has not had the desired impact, given that many of the strides or changes have not been implemented.

²⁵⁶ See Paras 2.1 above.

²⁵⁷ Ibid.

²⁵⁸ See paras 2.4 above.

²⁵⁹ Tourney *et al* 1999 <http://library.findlaw.com/1999/Jul/130357.html> at 1 (hereinafter referred to as Tourney *et al*).

Nevertheless, OHADA remains of great potential benefit to the African states and the continent at large. It is against these contexts that the author concludes that the benefits of uniformity outweigh the cost of preserving state sovereignty. Even if OHADA is not to the benefit of all Africans, can it serve as a model for the SADC? In ascertaining whether OHADA can serve as a model for the SADC, an analysis of the institutional structures and regulatory framework of OHADA and the SADC is relevant.

CHAPTER 3: OHADA Institutional Structures and Regulatory Framework

3.1 Introduction

As discussed in Chapter 2, the former French colonies applied out-dated and inconsistent French laws,²⁶⁰ which led to legal uncertainty and unnecessary cost to investors, discouraging investment. Judicial insecurity was also a major problem, which, according to Akouété,²⁶¹ was due to insufficient training of magistrates and auxiliaries of justice in economic and financial matters, and a lack of human and material resources. He further noted that the situation led to difficulties in the interpretation and application of the law, execution of court judgements, loss of confidence in the judicial systems, and reluctance on the part of investors.²⁶² It is against these contexts that the African leaders realised the need for a modern system of law to deal with commerce and other related matters.²⁶³ In pursuance of this need, OHADA was established and member states were expected to renounce their legislative and judicial sovereignty over certain trade law matters.²⁶⁴

This chapter aims to provide information that is not available in English literature, by providing an understanding of OHADA's institutional and regulatory framework. The chapter analyses the institutional structures created by the OHADA treaty and discusses OHADA's regulatory framework. Within the regulatory context, the focus is on the Uniform Act relating to the Companies Act, the Uniform Act organising Collective Proceedings for Wiping Off Debts (Insolvency Act) and the draft Labour Law, to familiarise readers with the Uniform Acts. In keeping up with its international standards and modernisation of the uniform Acts, the Council of Ministers (Council) ordered the modification or review of the Uniform Acts. At present, only the Uniform Act relating to

²⁶⁰ Tiger 2004 *Petites Affiches* (n 89) above (hereinafter referred to as Tiger).

²⁶¹ Akouété "Plaidoyer pour un espace OHADA plus attractif pour les investissements étrangers" 2 (translated as "Plead for a more attractive OHADA space for foreign investments") (hereinafter referred to as Akouété).

²⁶² *Ibid.*

²⁶³ Martor *et al* (n 91) above.

²⁶⁴ Kenfack "L'abandon de Souveraineté dans le Traité OHADA" 1999 *Penant* 125-134 (translated as "Transfer of sovereignty in the OHADA Treaty". See also Raynal "Intégration et Souveraineté: Le Problème de la Constitutionnalité" 2002 *Penant* 5-22 (Translated as "Integration and sovereignty: Constitutionality problem").

General Commercial Law²⁶⁵ and Secured Transaction Law²⁶⁶ have been modified.²⁶⁷ The law reforms are carried out with the assistance and support of the World Bank. Changes in the Companies Act and Insolvency Act are yet to be implemented, and this therefore means that the provisions of these laws apply as they currently exist in the member states.

The current state of affairs in Africa illustrates that a study of the Uniform Acts and the structures is necessary in the sense that it contribute to the corpus of knowledge and provides an understanding of the institutions and the Uniform Acts.

3.2 The OHADA institutional structure

In general, OHADA operates through five institutions, namely the Council, the Permanent secretariat, the CCJA, ERSUMA, and the Conference of Heads of State and Government. The latter institution, the Conference of Heads of State and Government has been formalised²⁶⁸ and serves as a forum to address political concerns relating to OHADA.²⁶⁹ With the exception of the Conference of Heads of State and Government and the Council, which operate on a rotating basis, the Permanent secretariat, the CCJA, and ERSUMA are permanent structures or institutions located in Yaounde, Abidjan, and Porto-Novo respectively.²⁷⁰

The institutions do not work in isolation, but in collaboration with one another²⁷¹ and in consultation with other regional organisations in order to ensure that the law is developed harmoniously. For example, at a West African Sub-regional meeting of

²⁶⁵ Anoukaha *et al* "The law governing commercial companies in the OHADA zone: A comparative study with Ghanaian and Nigerian Laws" 2010 *Juriscope* 7-15.

²⁶⁶ Modified 15 December 2010 and entered into force 16 May 2011. This is inspired by the French Secured Law of 2006 and the *UNCITRAL Legislative Guide on Secured Transaction Law* of 2008.

²⁶⁷ IFC 2010
<https://www.wbginvestmentclimate.org/publications/upload/OHADA-Report- July- December- 2010-for-internet.pdf at 2>.

²⁶⁸ Art 27 Revised OHADA treaty 17 October 2008.

²⁶⁹ Ademola (n 189) 2 and 46. 1. See also Dickerson "Perspectives on the future" in Dickerson C (ed)(2009) 92-110.

²⁷⁰ The PS is located in Yaoundé-Cameroon, the CCJA in Abidjan- Côte d'Ivoire and ERSUMA in Porto-Novo–Benin. The headquarters of the various institutions were distributed at the Council meeting in N'Djamena on 8 of April 1996.

²⁷¹ Akoueté 2008 www.ohada.com at 1-6 (hereinafter referred to as Akoueté 2008). See arts 5-12 OHADA Treaty.

OHADA, national commissions debated the draft Uniform Act on employment law, where the presence of both the West African Economic and Monetary Union (UEMOA)²⁷² and the Inter-African Conference on Social Welfare (CIPRES)²⁷³ was appreciated.²⁷⁴ Based on this collaborative spirit, it is important for OHADA to harmonise other regional groupings in which its members are also members,²⁷⁵ to avoid a conflict of law problem. This section begins with an analysis of the Conference of Heads of State and Government, followed by the Council, Permanent secretariat, ERSUMA, and the CCJA.

3.2.1 *The Conference of Heads of State and Government*

The Conference of Heads of State and Government is OHADA's supreme institution and serves as a forum to address political concerns relating to OHADA.²⁷⁶ It is composed of the heads of member states, and the presidency of the Conference is held on a rotating basis by each member state for one-year terms. It is chaired by the head of state who chairs the Council and decisions are taken by consensus, failing which it is by absolute majority of the parties present.²⁷⁷ The Conference of Heads of State and Government is convened by its president, or the initiative of two-thirds of its member states.

3.2.2 *The Council of Ministers (Council)*

As the name indicates, the Council is an institution composed of ministers of finance and justice in the member states.²⁷⁸ The office of the Council is held by each member state in alphabetical order, on an annual basis.²⁷⁹ Meetings are held by the presiding state on its own initiative, or upon request of at least one-third of the member states. If

²⁷² 10 of January 1994 and ratified on the 10 of July 1994.

²⁷³ 21 September 1993.

²⁷⁴ Pilkington (n 10) 31.

²⁷⁵ Inter-African Conference on Insurance Markets (CIMA), An inter-African Conference on Social Welfare (CIPRES), West African Economic and Monetary Union (UEMOA), Economic and Monetary Union of central African states (CEMAC) and Intellectual Property (OAPI).

See (<http://www.legalfrontiers.ca/2010/01/a-primer-to-economic-regional-integration-in-africa>; accessed 12 November 2011).

²⁷⁶ Art 27 Revised OHADA treaty.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

²⁷⁹ Art 28 OHADA treaty.

for some reason the presiding state is unable to take office, the state immediately following the presiding state alphabetically will be appointed by the Council. Decisions are taken by an absolute majority of the member states present,²⁸⁰ each state having one vote. This is to encourage compromise and to avoid domination by a country on the voting procedure.

The Council expresses the political will of the member states through its approval of the annual programs for the harmonisation of business law, and the adoption of the Uniform Acts.²⁸¹ The adoption of the Uniform Acts is the business of the Council. The Uniform Acts come into force 90 days after their adoption, and may be opposed within 30 days of their publication in the official OHADA Journal (OJ) and publication in the member states.²⁸² The publication of the Uniform Act is an important step in OHADA's harmonisation process because it promotes transparency, which is a principle of good governance in the exercise of power.²⁸³ However, two-thirds of the representatives may be required for the validity of a Uniform Acts.²⁸⁴ Moreover, each state has the power to veto any proposed legislation. This is designed to allay the fears of other Africa states that may wish to join the OHADA family, and to ensure general consensus of the member states.²⁸⁵ Admittedly, the decision-making process is less democratic because it excludes the local community, that is, business executives, lawyers, and academics who work with the laws on a daily basis. It also excludes the national legislators.²⁸⁶

The author appreciates the difficulties in reaching an agreement, but proposes that the Council should communicate with the representatives of commerce and industry, and

²⁸⁰ Ibid, art 30.

²⁸¹ Ibid, arts 8 and 11.

²⁸² Ibid, art 9.

²⁸³ Birkinshaw "Transparency and access to documents" in Birkinshaw P and Varney M *The European Union legal order after Lisbon* (2010) 229. The publication of the Uniform Acts is an innovation in Francophone Cameroon.

²⁸⁴ Boumakani "Les juridictions en Afrique noire francophone: La cour commune de justice et d'arbitrage de l'OHADA, les cours de justice de l'UEMOA et de la CEMAC" 1990 *Presses Universitaire du Cameroun* 68 (translated as "Jurisdiction in francophone Africa: OHADA Common court of justice and arbitration, justice paths of UEMOA and CEMAC").

²⁸⁵ Ibid.

²⁸⁶ The exclusion of national legislators is considered unconstitutional in Cameroon on the basis of Article 14 (1) of the Constitution of the Republic of Cameroon Law 96/06 of 18 January 1996. In terms of Article 14 (1) which provides "legislative power shall be exercised by the parliament..."

professionals, and that the draft Uniform Acts be submitted to various representatives for their comments or observation to give the Uniform Acts and OHADA's decision-making process a democratic flavour. Having recognised the need for a "democratic" OHADA, it is possible for OHADA's drafters to strengthen OHADA position and role over time, to benefit all, irrespective of their legal landscape.

As an administrative organ, the Council is responsible for the adoption of the annual budget of the CCJA and the Permanent secretariat; to determine the amount of annual contributions payable by the member states;²⁸⁷ the election of members of the CCJA and the adoption of the CCJA rules; the appointment of the permanent secretary and director of ERSUMA; the approval of accounts; and in general, to adopt regulations relevant to the implementation of the treaty.

3.2.3 Permanent Secretariat

The Permanent secretariat is the executive organ of OHADA and is based in Yaoundé, Cameroon. It is independent from the member states, and does not meddle with the political and economic affairs of OHADA's member states, to ensure that it is not affected by political pressures. It is headed by a permanent secretary appointed by the Council for a four-year term that may be renewed once.²⁸⁸ The permanent secretary in turn appoints other members of the bureau in accordance with the recruitment criteria determined by the Council. The permanent secretary is assisted by three directors in charge of legal affairs and relations, finance and accounts, and general administration respectively.²⁸⁹ The board of directors evaluates the laws of the member states, and proposes more efficient ways for the harmonisation of the laws.²⁹⁰ This board function is co-ordinated by the office of the Permanent secretariat, which has both a legislative and administrative function.²⁹¹

²⁸⁷ Art 43 OHADA treaty deals with the sources of funding.

²⁸⁸ *Ibid*, art 40.

²⁸⁹ *Ibid*.

²⁹⁰ Kirsch "History of OHADA" 1998 *Revue Pennant* 129.

²⁹¹ Arts 6, 7, 11, 29, 40 and 60 OHADA treaty.

In terms of legislation, the permanent secretariat assists the Council in the adoption of the Uniform Acts. In this regard, it proposes the annual programme for the harmonisation of business law, and is responsible for the drafting of the Uniform Acts.²⁹² The draft Uniform Acts are presented to the member states for consideration, and to the CCJA for its opinion. Upon receipt of the member states' comments and the CCJA's opinion, the Permanent secretariat finalises the draft and then submits it to the Council for adoption.²⁹³ Once adopted, it becomes the internal legal order of the member states. Administratively, the Permanent secretariat is responsible for the compliance of the list of candidates for election to the CCJA,²⁹⁴ and publication of the Uniform Acts in the OHADA legal journal, which becomes directly enforceable in all the member states.²⁹⁵

3.2.4 The Higher Regional School of Magistracy and Administration (ERSUMA)

ERSUMA is a regional institute attached to the Permanent secretariat, located in Porto-Novo, Benin,²⁹⁶ where it enjoys diplomatic privileges and immunities in the exercise of its functions. Its creation is in response to the insufficient legal training of magistrates and auxiliaries of justice, and judicial insecurity in the zone.²⁹⁷ Justifying the creation of the school, the Director General of the school declared, "there would be no success in the harmonisation of business law, without training of persons capable to understand the law, to disseminate the law, and to effectively apply them within the OHADA region".²⁹⁸ ERSUMA is composed of a board of directors responsible for its administration. The board of directors comprise the permanent secretary, who acts as chair, the president of the CCJA or its representative, three representatives from the national Supreme Courts of member states, two representatives from national training centres and two representatives of the permanent staff of the school.²⁹⁹ It also has an academic council to ensure academic standards, and a management team headed by a director general appointed by the Council.

²⁹² Ibid, arts 11 and 29.

²⁹³ Ibid, arts 6 and 7.

²⁹⁴ Ibid, art 33.

²⁹⁵ Ibid, art 9.

²⁹⁶ ERSUMA 1993 www.ohada.org/www.ersuma.bj.refer.org.at.1-5 (hereinafter referred to as ERSUMA).

²⁹⁷ Akouété (n 261) above.

²⁹⁸ This statement was made at a seminar on the Uniform Acts in Niamey, Niger on 9 and 10 June 1998.

²⁹⁹ Martor *et al* (n 91) 12.

ERSUMA's function is to train judges and legal officers such as lawyers, notaries, court experts, registrars, and bailiffs, as well as business executives and academics in OHADA law and the laws of other regional bodies,³⁰⁰ in order to improve the legal environment in the member states. Visiting professors who have in-depth knowledge and experience of the laws provide training that enables professionals to apply OHADA laws properly and efficiently. To date, only legal officers from the francophone countries have been admitted for training, due to the lack of trained common law professors in the OHADA structure. Two types of training are organised by the centre: the first type is open to judges and legal officers from the member states and the AU who are admitted with the approval of the board of directors of the school, and the cost of training is borne by OHADA.³⁰¹ Candidates are selected by their ministries of justice and finance, and/or national training centres or professional organisations, on the basis of their professional responsibilities, educational and professional background, and their legal functions.³⁰²

The second type of training is a refresher course on aspects of OHADA and other regional laws. It is open to private professionals who are required to pay a fee. Briefly, ERSUMA is a documentation centre for legal and judicial matters and a centre for the promotion and the development of research in African law, works on the harmonisation of law, and case law relating to communal and national courts.³⁰³ Like other institutions, ERSUMA receives financial assistance from the European Union (EU), and thereafter from member states' monthly contributions.³⁰⁴

3.2.5 The Common Court of Justice and Arbitration (*Cour Commune de Justice et d'Arbitrage-CCJA*)

OHADA is charged with establishing a strong and independent judicial system that ensures the proper application of the law, and efficient settlement of disputes.³⁰⁵ A

³⁰⁰ The 2007 package included various modules on OHADA and on UEMOA, OAPI and CIMA.

³⁰¹ Akouété 2008 (n 271) above.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Ibid, 13.

³⁰⁵ Tumnde (n 247)26.

supranational court has been established under the aegis of the CCJA to ensure the reliability of the judicial systems and to assure investors of their investments.³⁰⁶ The CCJA is an important and innovative institution for the member states located at the heart of the OHADA system.³⁰⁷ The CCJA functions as an appellate court for all of the judgments handed down by the national Courts of Appeal in matters relating to the Uniform Acts.³⁰⁸ It is also a forum for international arbitration. This combination is an innovative idea that has been greatly welcomed³⁰⁹ and has brought particular advantages. The first and perhaps the most obvious is that it saves time and money for parties, and does not deprive parties of their day in court. Secondly, it makes it possible for economic operators to include an arbitration clause providing for arbitration proceedings in any of the member states governed by modern laws - the Uniform Act on Arbitration and the CCJA Rules on Arbitration.³¹⁰

On this note, it is essential to discuss the capacity of the CCJA within which the appointment of the judges, arbitrators, and procedural issues are discussed. It begins with the judicial capacity of the court followed by its arbitral capacity, however, before pursuing this analysis, it should be mentioned that like other regional courts,³¹¹ access to the court is not reserved for the member states.³¹² Natural and legal persons, national courts, member states and OHADA institutions, such as the Council and the Permanent secretariat, have *locus standi* to approach the CCJA.³¹³ This access constitutes a fair and transparent process because it gives everyone the opportunity to be heard.

³⁰⁶ Amoussou-Guenou 1998 <http://www.wgzavocars.com/articles/ohada.html> at 4 (hereinafter referred to as Amoussou-Guenou).

³⁰⁷ The CCJA is located in Abidjan, Côte d'Ivoire, following its establishment on the 22 July 1996.

³⁰⁸ Norton (n 184) above. The CCJA does not handle criminal matters; art 14 (3) OHADA Treaty.

³⁰⁹ Boivin and Pic "L'arbitrage International en Afrique: Quelques Observations sur l'OHADA" 2002 *Revue Général de Droit* 847-864 and 858 "International arbitration in Africa : Some observations on OHADA". See also Nanette and Thouvenot "Les innovations de l'OHADA en matière d'arbitrage" 2004 *La Semaine Juridique* 28-35 ("Innovations of OHADA in arbitration matters").

³¹⁰ Both Acts were adopted on 11 March 1999.

³¹¹ The CEMAC Court of Justice is open to individuals and moral persons of the law. See art 14 *CEMAC Treaty* 1993. See also art 8 of the Additional Protocol No 1 relative to the organs of control of UEMOA.

³¹² Boumakani 1990 *Presses Universitaire du Cameroun* 72-73 (hereinafter referred to as Boumakani).

³¹³ Art 15 OHADA treaty.

Because direct access may be open to abuse, in the sense that a litigating party may well choose this route in an attempt to delay the review procedure, access to the court is subject to certain requirements. Applicants may only refer a case to the CCJA after exhaustion of all local remedies pertaining to the matter.³¹⁴ This is underpinned by the principle of subsidiarity, a commonplace and standard concept in other regional and international conventions.³¹⁵ Generally, there is no requirement of nationality and residence, but in most instances, the applicant must be resident in a member state, or frequently conduct business in the OHADA zone. This suggests that a foreign company with a branch or subsidiary within the OHADA zone may appear before the CCJA.

3.2.5.1 The *judicial capacity of the CCJA*

In its judicial capacity, the CCJA is composed of nine judges elected on the basis of their technical competence and integrity, which judges are drawn from the member states for seven years, which may be renewed once.³¹⁶ The number of judges can be increased, depending on the necessity of service and finance. The office is reserved for magistrates, advocates, and professors of law who have at least 15 years of professional experience.³¹⁷ Of the nine seats, two are open for professors and practising lawyers, and the others for judges who have exercised senior judicial functions.³¹⁸ The court is headed by a president appointed from the judges for a three and a half year term.³¹⁹ The president directs proceedings and services of the court, presides over court sessions, represents the court in all matters assigned to it³²⁰ and appoints the Chief clerk, the Secretary General, and the Chief Registrar in accordance with the criteria defined by the Council;³²¹ assists the court in the administration of arbitration proceedings;³²² and assists the Secretary General of the court.³²³

³¹⁴ Ibid, art 13.

³¹⁵ Art 15 *SADC Protocol on Tribunal and Rules of Procedure* 1992 (hereinafter referred to as Tribunal Protocol) and art 26 *COMESA Treaty* 1993.

³¹⁶ Art 31 (1) Revised OHADA treaty. Art 2 *CCJARules of Procedure*.

³¹⁷ Ibid.

³¹⁸ Ibid.

³¹⁹ Ibid, art 6.

³²⁰ Ibid, art 7.

³²¹ Ibid, art 39.

³²² Ibid, art 39 (3).

³²³ Ibid.

The CCJA is a supranational judicial body empowered to ensure the uniform application and interpretation of the present treaty, regulations, and the Uniform Acts.³²⁴ The advantage hereof is that it permits uniform interpretation of the uniform Acts, which in turn precludes any potential conflict between the member states.³²⁵ It also has contentious jurisdiction to rule on decisions pronounced by national Appeal Courts in matters pertaining to the Uniform Acts and the present treaty.³²⁶ As a court of cassation, its role is not to re-judge the matter, but simply to verify whether the law was correctly applied, or whether the rules and procedure were observed.³²⁷ Where a decision of a national court is quashed, the CCJA may decide on the substance of the matter, without referral to a national jurisdiction. The ruling of the court is by majority votes, and in case of a tie, the president shall have the casting vote.

The decisions of the CCJA have the status of *res judicata*,³²⁸ which means that the decisions of the court are final and conclusive. For Lohouse-Oble,³²⁹ “this reflects clear judicial supranationality, in which a transfer of competencies from national jurisdictions to the community-level jurisdiction has occurred”. The supranationality of the court³³⁰ is underlined in Article 16 of the treaty, which states, “seizure of the court suspends every cassation proceedings engaged before the national jurisdiction against the contested decision. Any proceedings of the national jurisdiction can take effect only after judgment of the CCJA declaring its incompetence to deal with the matter”. Thus, any proceedings before a national jurisdiction, after the seizure of the court, shall be invalid.

Mkandawire³³¹ rightly states that “judicial proceedings are pointless if a litigant cannot have a judgment enforced”. Therefore, what justice is to the society, so enforcement is

³²⁴ Art 14 OHADA treaty.

³²⁵ Tumnde “Cameroon offers a contextual approach to understanding the OHADA treaty and Uniform Acts” in Dickerson CM (ed) (2009) 51.

³²⁶ Ibid.

³²⁷ Boumakani (n 312) 82.

³²⁸ Arts 20OHADA treaty and 41 CCJA Rules of Procedure.

³²⁹ Lohouse-Oble (n 119) 23.

³³⁰ Assepo “La cour commune de justice et d’arbitrage de l’OHADA: Un troisième degré de juridiction?” 2005 *Revue Internationale de Droit Comparé* 23 (translated as “CCJA: Third degree jurisdiction”).

³³¹ Mkandawire “The SADC Tribunal perspective on enforcement of judgements: state support and

to judicial proceedings. Judgments of the CCJA arise in several ways: from an appeal by a disputing party challenging the decision of a national Court of Appeal,³³² and from an appeal from a disputing party challenging the jurisdiction of a national Supreme Court in matters relating to the application of the Uniform Acts.³³³ But it is important to understand that like the SADC Tribunal,³³⁴ the CCJA has no enforcement powers, and that the procedure of judicial enforcement of judgments against recalcitrant member states is not present in the OHADA set up. Thus, the ultimate enforcement of the judgments of the CCJA and the OHADA laws are carried out in the national courts of the member states, through the application of their Civil Procedure Laws.³³⁵

For example, in Cameroon, enforcement of foreign court decisions is in accordance with law relating to the execution of judgments.³³⁶ Under the law, a party seeking recognition and enforcement in civil, commercial, and labour matters is required to file a petition to the judge in charge of litigation in the place of enforcement, with the following documents: copy of the judgment; original copy of proof of service of the decision or any act that justifies proof of service; and a certificate of non-appeal issued by the registrar.³³⁷ In all cases, a person who wishes to enforce OHADA law or judgment of the CCJA, is required to invoke national remedies in the state in which enforcement is sought without further examination of the decision, except verification of the authenticity of the documents presented for enforcement.³³⁸

3.2.5.2 *Arbitral capacity of the CCJA*

cooperation" 2010 *Commonwealth Law Bulletin* 1.

³³² Art 14 OHADA treaty.

³³³ *Ibid*, art 18.

³³⁴ Within the SADC, art 32 Tribunal Protocol obliges member states to comply with judgments of the Tribunal. In the event of a failure, the Summit is empowered in terms of art 33 of the Tribunal Protocol to take appropriate actions. Thus, ultimate enforcement of SADC law is in the hands of the highest political organ, which is the Summit.

³³⁵ Lohouse-Oble (n 118) above. See also Art 46 *CCJA Rules of Procedure*.

³³⁶ 2007/001 of 19 April 2007.

³³⁷ *Ibid*, s 6.

³³⁸ Art 46 *CCJA's Rules of Arbitration*.

In its arbitral capacity,³³⁹ the CCJA acts as an arbitration centre³⁴⁰ similar to the International Chamber of Commerce (ICC) Rules³⁴¹ in a number of respects. First, both have the capacity to examine draft arbitral awards, and to make amendments to them. Secondly, they contain rules that guard over arbitration proceedings, and the appointment and confirmation of the appointment of arbitrators.³⁴² Compared to other arbitration laws, which contain domestic and international arbitration provisions, the OHADA framework makes no such distinction.³⁴³ This is to create a unitary arbitral system. Instead, OHADA provides for institutional arbitration under the auspices of the CCJA, in accordance with the CCJA's Rules of Arbitration³⁴⁴ and ad hoc arbitration in accordance with the Uniform Act on Arbitration.³⁴⁵ When drafting their arbitration clause, parties are at liberty to choose either the CCJA's Rules of Arbitration or the Uniform Act on Arbitration. The difference between the Uniform Act on Arbitration and the CCJA's Rules of Arbitration lies in their scope of application. The Uniform Act on Arbitration is only applicable where the seat of the tribunal is located in any of the member states, while the CCJA's Rules of Arbitration applies irrespective of the seat, but provided that one of the parties is domiciled or resident in any of the member states.³⁴⁶

However, it should be highlighted that the rules complement each other in matters not sufficiently dealt with or regulated by the law.³⁴⁷ It is notable that both rules are implemented alongside existing national arbitration rules, which are not in conflict with the rules.³⁴⁸ The arbitral power of the CCJA is sanctioned by Article 21 of the OHADA

³³⁹ For a detailed examination of OHADA arbitration; see Mbaye 2001 www.lexana.org at 1-2 (hereinafter referred to as Mbaye).

³⁴⁰ Fouchard "Le système d'arbitrage de L'OHADA: Le démarrage" 2004 *Petites Affichés* 52-58 (translated as "OHADA arbitration system : Startup").

³⁴¹ ICC Rules of Arbitration of 1 January 1998.

³⁴² Martor *et al* (2007) 272 (hereinafter referred to *Martor et al* 2007).

³⁴³ Fouchard "The arbitration and harmonisation of the business law" 1999 *Arbitration Review* 541. See also Meyer "OHADA uniform Act on the arbitration law" 1999 *International Business Law Journal* 633.

³⁴⁴ *The CCJA Rules of Arbitration* 11 March 1999.

³⁴⁵ *The Uniform Act on Arbitration* 11 March 1999.

³⁴⁶ Samassekou and Song 2011 *Journal of Politics and Law* 63 (hereinafter referred to as Samassekou and Song).

³⁴⁷ Matters such as the determination of the capacity of a person to resort to arbitration or whether a particular dispute is arbitral. In terms of art 2 Uniform Act on Arbitration, all persons whether the state, public authorities and public companies may submit to arbitration.

³⁴⁸ CCJA's Advisory Opinion 001/2001 of 30 April 2001.

treaty which provides: “in application of an arbitration clause or an agreement to arbitrate, any party to a contract, provided one of the parties has its domicile or its usual residence in one of the member states, or the contract is performed or to be performed in whole or in part in the territory of one or several member states, may submit a dispute of a contractual nature to the court”. From this provision, it follows that the court will rule on arbitral matters only when there is:

- a demand by the parties (arbitration agreement);³⁴⁹
- one of the parties has its domicile or habitual residence in any of the member states; or
- performance is made in whole, or in part, in any of the member states.

When parties to a contract have agreed to settle their dispute by arbitration, they are required to appoint arbitrators.³⁵⁰ The Uniform Act on Arbitration and the CCJA Rules of Arbitration recognise the principle of equality between the parties in the formation of the tribunal, and the appointment and dismissal of arbitrators.³⁵¹ The principle of equality, as confirmed by Article 9 of the Uniform Act on Arbitration, states that “the parties shall be considered as equals and each party should have the possibility to assert its rights”. This principle ensures that no party has greater influence over the other.³⁵² Under both rules, the arbitral tribunal is composed of either a single arbitrator, or a panel of three arbitrators appointed by the parties themselves.³⁵³ In case of a unique arbitrator, a joint appointment is made by the parties, and in the case of three, parties each appoint an arbitrator and jointly appoint the third within 30 days from the date of notification to the other party. A likely problem that may be encountered in the appointment of the third arbitrator, is the possibility of dissenting and separate opinions between the parties.

Upon the failure or default of the parties to appoint arbitrators to the arbitral tribunal, the local court in the member state in which the seat of the tribunal is located makes the

³⁴⁹ Art 5 *CCJA Rules of Arbitration*.

³⁵⁰ *Ibid*, art 3 and art 22 OHADA treaty.

³⁵¹ Art 5 *Uniform Act on Arbitration*.

³⁵² Martor *et al* 2007 (n 342) 264.

³⁵³ Art 8 *Uniform Act on Arbitration*.

appointment,³⁵⁴ or the CCJA makes the appointment from a list of arbitrators drawn up by the CCJA, in consultation with experts in the field of international commercial arbitration.³⁵⁵ Arbitrators appointed by the parties do not enjoy diplomatic immunities or privileges in the exercise of their functions, while arbitrators appointed by the CCJA enjoy immunities and privileges.³⁵⁶ This provision creates an unjustified inequality. The appointed arbitrators are required to be independent of the parties,³⁵⁷ so that they can rule as arbitrators *ex aequo bono* at the request of the parties, in accordance with rules of law decided by the parties, or the tribunal, if the parties fail to determine appropriate rules.³⁵⁸

Arbitration proceedings are held in camera,³⁵⁹ but it does not mean they are not subject to review. Third parties are allowed to attend hearings for the consideration of their views.³⁶⁰ After the parties have been heard, the arbitrators make the necessary award.³⁶¹ Article 25 of the OHADA Treaty recognises the *res judicata* nature of arbitral awards of the CCJA, and its enforcement in accordance with the ordinary rules of civil procedures of the member states. Arbitral awards are only enforceable in the state in which it is issued.³⁶² However, for an enforcement of an award in a state other than the one in which it is issued, the requesting state must apply for an enforcement order (*exequatur*).³⁶³ Only the CCJA is competent to issue an *exequatur* for the enforcement of an award issued by the Court in the rest of the member states.³⁶⁴ An *exequatur* may

³⁵⁴ Ibid, art 5.

³⁵⁵ Art 3.2 *CCJA Rules of Arbitration*.

³⁵⁶ Art 49 OHADA treaty.

³⁵⁷ Art 4 (1) *CCJA Rules of Arbitration*.

³⁵⁸ Art 15 *Uniform Act on Arbitration* and 17 *CCJA Rules of Arbitration*.

³⁵⁹ Art 14 *CCJA Rules of Arbitration*.

³⁶⁰ Ibid, art 45.

³⁶¹ It must however be noted that an arbitral award granted contrary to public international order is null and void; see *Société Planor Afrique (SA) v Société Atlantique Telecom (SA)* Judgment 03/2011 of 31 January 2011.

³⁶² Yacoob "Shopping for justice: The non-enforcement of an arbitral award set aside in its country of origin" 2007 *Edition of Griffin's View* 67.

³⁶³ Ibid, art 31 *Uniform Act on Arbitration*. Under art 30.2 *CCJA Rules on Arbitration*, it is issued by the CCJA and it is enforceable in all member states where necessary.

³⁶⁴ Art 30(5) *CCJA Rules of Arbitration*. See the *International Bank of Burkina Faso (BIB) v Kiendrebeogo Rayi Jean* 2007 (unreported). In casu, an enforcement order was granted by the CCJA in favour of BIB against an arbitral sentence rendered by the arbitral tribunal of Burkina Faso for its execution in Burkina Faso and the rest of the member states.

be denied in the following cases: firstly, if the arbitrator failed to rule in accordance with the arbitration agreement; secondly, if there is lack of due process; and thirdly, if the award is contrary to a country's international public policy.³⁶⁵

OHADA also uses the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,³⁶⁶ which is composed of 130 member states with the nine OHADA member states being Benin, Burkina Faso, Cameroon, Côte d'Ivoire, Guinea, Mali, Niger, Central African Republic and Senegal. The Convention forms part of the applicable law of the nine member states with the aim to ensure that agreements and awards are enforced. Because of the possibility of conflict that may result in the application of these rules, it is strongly recommended that if arbitration is the desired means of settling disputes, it must be clearly spelled out by the parties.³⁶⁷ Under the Convention, if enforcement of a foreign award is sought by a state, a member of the UN Convention in one of the OHADA member states or a member of the Convention, then enforcement will be subject to the rules of the Convention.³⁶⁸ However, between OHADA member states, it is subject to the Civil Procedures of the member states.

At present, all proceedings are conducted in French. This implies that appeals from anglophone Cameroonians may be quashed or set aside, because of lack of trained common law practitioners at the court, and this is another area of OHADA that must be considered for the realisation of its goals. The location of the CCJA is another issue that requires attention. The CCJA is located in Abidjan in Côte d'Ivoire, and the location of the court has been the cause of some resistance on the parts of other national courts to refer cases to the court.³⁶⁹ For Dickerson,³⁷⁰ "the unwillingness of national courts to refer business-related cases to the court is largely due to the fear of losing interesting cases to the CCJA". For Babatunde,³⁷¹ it "is a reflection of an attachment to national

³⁶⁵ Art 25 OHADA treaty.

³⁶⁶ 10 June 1958.

³⁶⁷ Kroll "Arbitration" 2006 *Elgar Encyclopedia of Comparative Law* 83-86.

³⁶⁸ *Ibid*, 86-87.

³⁶⁹ Lohouse-Oble (n 189) above.

³⁷⁰ Dickerson (n 218)57-58.

³⁷¹ Babatunde *A politico-legal framework for integration in Africa: Exploring the attainability of a supranational Africa Union* 97 (hereinafter referred to as Babatunde).

sovereignty, which has the potential of impeding the progressive aspiration of the OHADA". Another reason relates to financial problems, which explains why the vast majority of appeals to the CCJA come from Côte d'Ivoire. Saadani showed that 90 percent of the cases decided by the CCJA are transferred locally from the Ivorian courts.³⁷²

Despite the problems, at least some jurisdictional uncertainties that have obstructed cross-border matters are resolved through the creation of the CCJA, which still leaves open a dual system of remedies in the settlement of disputes pertaining to the Uniform Acts.

3.2.5.3 *The relationship between national courts and the CCJA*

It is useful to point out that OHADA maintains a dual system of remedies in the settlement of litigation/disputes regarding the implementation of the Uniform Acts. The fact is, national courts retain jurisdiction in the first instance, and on ordinary appeal to the national appeal courts on matters related to the Uniform Acts.³⁷³ From the national appeal courts, the matter is taken on appeal at the supreme level to the CCJA. An appeal to the CCJA can be made in three different situations:

- A party can directly file an appeal before the CCJA against a decision of a national Appeal court.³⁷⁴ Such an appeal must be made within two months of the service of the challenged decision.³⁷⁵ If the decision is quashed, the CCJA hears the case on its merits, though a process known as *evocation a de novo*;
- A party can also apply to challenge the jurisdiction of a national Supreme Court and if the CCJA finds that the national Supreme Court lacks jurisdiction, it will declare null and void the judgment of the national Supreme Court.³⁷⁶ Appeal in this respect is made within two months of notification of the decision to the national court; and

³⁷² Saadani (n 242) 487.

³⁷³ Art 13 OHADA treaty.

³⁷⁴ Ibid, art 14.

³⁷⁵ Art 28 *CCJA Rules of Procedure*.

³⁷⁶ Art 18 OHADA treaty.

- Appeal can also be made by a national Supreme Court that considers that it does not have jurisdiction to hear a case relating to the Uniform Acts.³⁷⁷ When this happens, all proceedings before the national Supreme Court are suspended.

The national Supreme Courts are replaced by the CCJA. This means that if a dispute falls within the jurisdiction of the CCJA and is taken on appeal to a Supreme Court, the Supreme Court must refer the parties to the CCJA.³⁷⁸ In the case between the *Standard Chartered Bank S.A. v Sinju Paul and others*,³⁷⁹ the Supreme Court of Yaoundé, Cameroon, referred the matter to the CCJA because of lack of jurisdiction. Failing this, the decision of the Supreme Court will be declared null and void.³⁸⁰ The lack of jurisdiction of national Supreme Courts may be raised by the court itself, or any party to the dispute.³⁸¹ In the matter between *Bamba Fetique v Adia Yego Therese*,³⁸² the CCJA declared a decision rendered by the judicial bench of the Supreme Court of Côte d'Ivoire null and void, on the grounds of lack of jurisdiction to rule on matters pertaining to the application of Article 864 of the Companies Act such as partnership matters.³⁸³

Similarly, in *Muvrielle Corinne Christel Koffi et Sahouot Cedric Koffi v Société ECOBANK*,³⁸⁴ the CCJA declared the incompetence of the Supreme Court of Côte d'Ivoire to rule on issues pertaining to the granting or suspension of provisional measures. This is because issues pertaining to the granting or suspension of provisional measures fall within the competence of the CCJA.³⁸⁵ Conversely, a manifest lack of jurisdiction of the CCJA may be raised *proprio motu* by the court itself, or by the

³⁷⁷ Ibid, art 15.

³⁷⁸ Ibid, art 18.

³⁷⁹ Judgment 32/CC of 27 October 2005,

³⁸⁰ Ibid.

³⁸¹ Ibid.

³⁸² Judgment 031/2004 of 4 November 2004. In *casu*, Adia requested the Court of First Instance (CFI) of Côte d'Ivoire for the recognition of a de facto partnership between her and her late husband. Her demand was granted on the basis of art 866 *Companies Act* which permits a third party to petition a competent court for recognition of de facto partnership between two or more persons. This demand was confirmed on appeal. The defendant; Bamba took the matter on appeal to the Supreme Court for annulations of the decision of the Appeal Court.

³⁸³ Art 864 *Companies Act* provides "A de facto partnership shall exist where two or more natural persons or corporate bodies act as partners without having formed between themselves one of the companies recognised by this Uniform Act".

³⁸⁴ Judgment 006/2005 of 27 January 2005.

³⁸⁵ Art 32 Uniform Act on *Debt Recovery and Enforcement Act* 10 April 1998.

parties to the litigation in *limine litis*. In such cases, the CCJA is required to reach a decision within 30 days. In *Société Générale Prestation Service v Société Catering International Service*,³⁸⁶ the CCJA declared its incompetence because it was a matter that fell within the jurisdiction of the Appeal Court of Chad.³⁸⁷

3.3 The OHADA regulatory framework

In terms of Article 5 of the OHADA treaty, the Uniform Acts are “Acts enacted for the adoption of common rules as provided for in Article 1 of the present treaty ... known as ‘Uniform Acts’”. At present, nine Uniform Acts are in force in the member states. They are:

- Uniform Act on General Commercial Law;³⁸⁸
- Uniform Act on Commercial Companies and Economic Interest Groups;³⁸⁹
- Uniform Act on Organising Collective Proceedings for the Writing Off of Debts;³⁹⁰
- Uniform Act on Accounting;³⁹¹
- Uniform Act on Securities;³⁹²
- Uniform Act on Contracts for the Carriage of Goods by Road;³⁹³
- Uniform Act on Simplified Recovery Procedures and Enforcement Measures;³⁹⁴
- Uniform Act on Arbitration,³⁹⁵ and

³⁸⁶ Judgment 024/2005 of 31 March 2005. See *Souleymane Cherif v Société Chronopost international Côte d’Ivoire*, Judgment 001/2005 of 27 January 2005.

³⁸⁷ The case dealt with the application of Articles 1134 and 1149 of the Civil Code of the Republic of Chad. The said articles provides for the payment of damages and interests for prejudice suffered in the event of breach of contract.

³⁸⁸ 1 January 1998 as amended by the *Uniform Act on General Commercial Law* 15 December 2010 (hereinafter referred to as the *General Commercial Law*)

³⁸⁹ 1 January 1998 (hereinafter referred to as the *Companies Act*) as revised (Revised Code) on 30 January 2014. The Revised Code will be published in the Official Journal by April 2014 and will become effective from July 2014; see Shearman & Sterling LLP “A revised uniform companies code for the 17 African countries of OHADA”; available at: http://www.shearman.com/-media/files/News/insights/Publications/2014/02/Revised_Uniform_Companies_Code_for_the_17_African_Countries_of_OHADA_PDF_020814.ppt; accessed 12 February 2014.

³⁹⁰ 1 January 1999 (hereinafter referred to as the *Insolvency Act*).

³⁹¹ 1 January 2002 (hereinafter referred to as the *Accounting Act*).

³⁹² 1 January 1998 as amended by the Uniform Act on Security 16 May 2011 (hereinafter referred to as the *Securities Act*).

³⁹³ 1 January 2004 (hereinafter referred to as the *Carriage of Goods by Road Act*).

³⁹⁴ 10 July 1998 (hereinafter referred to as the *Debt Recovery and Enforcement Act*).

³⁹⁵ 11 June 1999 (hereinafter referred to as the *Arbitration Act*).

- Uniform Act on Co-operatives.³⁹⁶

The Uniform Acts are modelled on the French civil and business laws,³⁹⁷ a fact due not to the arbitral choice of the member states, but to that of history and the socio-cultural realities of the member states.³⁹⁸ It is worth mentioning that the applicability of the Uniform Acts is derived from the OHADA treaty itself, in the sense that once the Treaty is ratified according to the constitutional procedures of the member states, the Uniform Acts become automatically binding on the member states.³⁹⁹ Article 10 of the present Treaty indicates the legal value of the Uniform Acts in terms of which “*les Actes uniformes sont directement applicables et obligatoires dans les états parties nonobstant toute disposition contraire de droit interne, antérieure ou postérieure*”. This means that the Uniform Acts are directly applicable in the territory of the member states and substitute both pre-existing and subsequent national legislation.⁴⁰⁰ Article 10 signifies two things: firstly, it signifies that the Uniform Acts are automatically applicable in the member states upon adoption and publication in the official Journal of the OHADA and the member states.⁴⁰¹ By implication, the member states do not need to enact any legislation to assure the transposition of the Uniform Acts within their internal legal order (direct effect).⁴⁰² Secondly, Article 10 signifies the supremacy of the Uniform Acts over national laws, which means that in the event of conflict between a Uniform Act and national law, the Uniform Act will prevail.⁴⁰³

Article 10 emphasises the point that the Uniform Acts are an integral part of the national legal systems which the national courts are bound to apply and uphold, and thus may

³⁹⁶ 15 December 2010 (hereinafter referred to as *Cooperative Act*).

³⁹⁷ See <http://www.internationalarbitrationlaw.com/courts-of-arbitration/ohada> at 1. See also Wessels “Insolvency law” 2006 *Elgar Encyclopaedia of Comparative Law* 294-311 noting that the OHADA Insolvency Act reflects in its key points French insolvency law as it stood in the mid-1990s.

³⁹⁸ Daho “Quelques éléments de réflexions sur la diffusion du droit uniforme de l’OHADA dans un contexte de multilinguisme et dans une perspective bi-juridique” 5 (hereinafter referred to as Daho).

³⁹⁹ Art 10 OHADA treaty.

⁴⁰⁰ Ibid.

⁴⁰¹ Ibid, art 9.

⁴⁰² Ipanda 2001 www.ohada.com at 5 (hereinafter referred to as Ipanda).

⁴⁰³ Koné *Le nouveau droit commerciale des pays de la zone OHADA: Comparaison avec le droit Français* (2005) 5 (translated as *The new business law for OHADA member states: Comparison with French law*).

not deviate from their provisions. It follows therefore that, once a Uniform Act is adopted, the member states no longer have the right to apply national laws in respect of the matter regulated by the Uniform Act. Rather, they are required to review their laws with the view to set aside national laws that do not conform to the Uniform Act. The interpretation of Article 10 has raised many concerns. The doubts as to the wording of Article 10 have however been settled by the CCJA. Following an advisory opinion⁴⁰⁴ sought by the Côte d'Ivoire, the CCJA confirmed the supremacy of the Uniform Acts by pointing out that:

Article 10 du traite comporte bien une règle de supranationalité; qu'il entraine l'abrogation des dispositions nationales contraires ou identiques a celles des actes uniformes et emporte interdiction pour les Etates de prendre, ultérieurement a la publication desdites actes, des dispositions législatives ou réglementaires qui leur soient contraires ou identiques.

According to the CCJA, the Uniform Acts replace national provisions that are contrary or similar to the Uniform Acts. Article 10 indicates the supranationality of the Uniform Acts in terms of which member states are prevented from enacting laws that are similar or contrary to the Uniform Acts. The same position was upheld by the CCJA in *Couple Karnib v The General Bank of the Côte d'Ivoire Coast (SGBC)*⁴⁰⁵ wherein the CCJA set aside an order of the Appeal Court of Abidjan rendered on the basis of Articles 180 and 181 of the Civil procedure code of the Côte d'Ivoire, on the grounds that it was contrary to Article 32 of the Uniform Act on Debt Recovery and Enforcement Act.⁴⁰⁶ For Ndibo,⁴⁰⁷ there should be no difficulty in applying the Uniform Acts, because they do not compete with the internal laws of the member states in the subjects they govern. The question has been raised whether there is uniform application of the Uniform Acts in Cameroon,

⁴⁰⁴ CCJA's Advisory Opinion 001/2001/EP 30 April 2001.

⁴⁰⁵ Judgment 002/2001 of 11 October 2001. In *casu*, the bank applied for the suspension of a provisional order which was granted in favour of the couple. Under the national laws, it is possible for the courts to suspend a provisional order which is not the case under OHADA.

⁴⁰⁶ Siewe "Enforcement measures under OHADA law: Problems and proposed solutions" 132-133 (2003, unpublished and on file with author) (hereinafter referred to as Siewe).

⁴⁰⁷ Ndibo "Interim measures: Summary and doctrine of the Karnib's case" 1 (2003, unpublished and on file with author) (hereinafter referred to as Ndibo).

given that it operates a mixed legal system.⁴⁰⁸ In view of the fact that the Uniform Acts have their origins in the present French law, one could easily say that there is no uniform application of the Uniform Acts in Cameroon.

3.3.1 The Uniform Act on Commercial Companies and Economic Interest Group

3.3.1.1 Introduction

The Companies Act is the largest part of the OHADA reform with over 920 articles, all of which are mandatory.⁴⁰⁹ The Act prescribes rules relating to the formation and functioning of business organisations; the transfer of promoters' liability to subsequently formed business organisations; responsibility and liability of management;⁴¹⁰ the restructuring and transformation of companies⁴¹¹ and to public offerings.⁴¹² The Act is modelled on the French company law,⁴¹³ the Guinea Conakry law,⁴¹⁴ and the Code on Economic Activities from which a number of innovations were copied, some of which include the sole-owner form of company and the possibilities it grants to shareholders to choose between the three forms of management.⁴¹⁵ The Act has not generated enough case law making it difficult to interpret some of the provisions of the Act. As a consequence, much reference is made to French case law and doctrines in the interpretation of the provisions of the Act.

The provisions of the Companies Act apply to every business organisation with a registered office located in the territory of one of the member states. Due to the difficulty of circumscribing the boundaries between a company and a partnership, the French

⁴⁰⁸ Penda "The history of the harmonisation of laws in Africa" in Dickerson (2009) 13-17. See Tabe-Tabe 2002 (n 216) above.

⁴⁰⁹ Art 2 *Companies Act*.

⁴¹⁰ *Ibid*, arts 317-384.

⁴¹¹ The *Companies Act* provides for three different types of restructuring – mergers, spin-off and partial transfers of company's assets.

⁴¹² Arts 81-96 *Companies Act*. See Tumnde "Cameroon offers a contextual approach to understanding the OHADA treaty and uniform Acts" 57-58 (hereinafter referred to as Tumnde).

⁴¹³ 24 July 1966 whose dispositions are integrated in the *Code of Commerce*. See Agboryibor "OHADA, nouveau droit uniforme des sociétés" 1998 *International Business Law Journal (IBLJ)* 673. See also Koné (2003) 10-11 (hereinafter referred to as Koné). Koné noted that the primary corporate law was based on French laws of 1967.

⁴¹⁴ 92-043 of 8 December 1992.

⁴¹⁵ Paillusseau "L'acte uniforme sur le droit des sociétés" 2004 *Petite affiches* 20.

term “société commerciale”, that is, commercial companies, is used.⁴¹⁶ In terms of Article 4 of the Companies Act, a commercial company is a “contract between two or more persons who agree to assign assets in kind or cash to an activity for the purpose of sharing profits or to contribute to losses that may result from the contract”.⁴¹⁷ This definition is misleading because the Council has not sufficiently maintained the distinction between a company and a partnership. Although a logical distinction between a company and a partnership does not put a bridge between the two, it is necessary to make the distinction so as to avoid confusion in the minds of the readers. According to Osborn’s Concise Law Dictionary:

A company is an association of persons formed for the purpose of some business or undertaking carried out in the name of the association, each member having the right to assign his shares to any person subject to regulations of the company.⁴¹⁸

A fundamental feature of a company is the underlying principle that upon incorporation, it acquires a separate legal personality distinct from those of its members.⁴¹⁹ This means that upon incorporation, a company acquires the right to contract, sue, and be sued. Another underlying feature is that a company does not automatically come to an end; this is referred to as the principle of perpetual succession and in terms of this principle, a change in membership does not affect the continued existence of the company.

A partnership on the other hand, in the words of Black’s Law Dictionary is: “a voluntary association of two or more persons who jointly own and carry on a business for profit”.⁴²⁰ A partnership is presumed to exist if persons agree to share proportionally the business profits or losses. It is not a legal entity because it does not acquire a legal personality upon its incorporation. Because the partners and the partnership are indistinguishable, the debts of the partnership, which in law are *solidum*, are borne

⁴¹⁶ The *French Companies Act* 1 August 1967.

⁴¹⁷ Art 4 *Companies Act* is a blueprint of art 1832 of the *French Civil Code* 1985.

⁴¹⁸ Mick *Osborn’s concise law dictionary* (1958) 83.

⁴¹⁹ Art 98 *Companies Act*.

⁴²⁰ Garner *Black’s law dictionary* (1999) 1142.

jointly and severally by the partners. Moreover, a partnership does not have a perpetual succession because a change in membership affects the continued existence of the partnership. For example, upon the death of a partner, the partnership shall terminate.⁴²¹

In view of the above, a company is not a partnership, and as such the definition of a company under Article 4 of the Companies Act cannot be presumed to include a partnership. However, if it had been the intention of the Council not to use the term company as a synonym to partnership, one would have expected that to be included in the Companies' Act. To avoid confusion, it is submitted that a definition section should be included at the beginning of the Act as is the case in other systems. Also, the term "limited liability" should be employed to describe commercial companies and "unlimited liability" to describe partnerships.

3.3.1.2 *Forms of business organisations*

The Companies Act prescribed seven forms of business organisations - public limited company (*société anonyme-SA*); private limited company (*société a responsabilité limitée-SARL*); general partnership (*société en nom collectif-SNC*); limited partnership (*société en commandité simple-SCS*); economic interest group (*groupement d'intérêt économique-GIE*); de facto company (*société de fait*); and joint venture (*société en participation*).⁴²² An innovation of the Companies Act is the possibility it creates for the formation of a one-man business, the existence of which is guaranteed by Article 5 of the Companies Act, which provides that "*la société commerciale peut être également créée dans les cas prévus par le présent Acte uniforme par une seule personne, dénommée associée unique, par un acte écrit*". This means that a company may be owned by one person. As a one-man business, the owner ensures its capital,

⁴²¹ Art 290 *Companies Act*.

⁴²² Oumar and Mamadou *Guide pratique: Des sociétés commerciales et du groupement d'intérêt économique (GIE)* (2008) 1-2157 (translated as *Practical guide: Commercial companies and economic interest groups*).

management, and contribution to losses. Upon the death of the person, the organisation automatically comes to an end.⁴²³

With the exception of the joint venture, every business organisation is required to apply for registration at the competent court within whose jurisdiction the business is operated.⁴²⁴ The review of the Securities Act⁴²⁵ resulted in the establishment of a public, centralised, and computerised system of registration of companies and security rights at the local, national, and regional levels. Registration of companies and security rights is an important component of banking and commercial activities. It facilitates access to information by third parties of the degree of indebtedness of a person and corporate entity.⁴²⁶ The form of business organisations varies from one member state to another and this nation-to-nation inconsistency is problematic in the face of OHADA's drive towards uniformity. In Senegal, GIE is the most favoured while in the Côte d'Ivoire, SARL and GIE are the most favoured forms.⁴²⁷ In Cameroon the SARL is also the most favoured and common type.⁴²⁸

While introducing new forms of business organisations, the classical types of *société des personnes* and *société des capitaux*, which may be translated as partnerships and commercial companies, are maintained.⁴²⁹ The existence of partnerships is based on *intuitu personae*, that is, on the personal relationship of the partners, while companies are based on *intuitu pecuniae*, that is on the financial contributions of members.⁴³⁰ While partners in a partnership have unlimited liability for the debts of the partnerships,

⁴²³ Nzalie "Reflecting on OHADA law reform mission: Its impacts on certain aspects of company law in Anglophone Cameroon" 2002 *African University Press* 107.

⁴²⁴ See arts 20-68 *General Commercial Law*. In Cameroon, the President of the CFI is empowered to register companies and security rights in the country. This is by virtue of Decree 2002/302 of 3 December 2002; Asuagbor "The uniform act on general commercial law: Access to and exercise of trading profession" 11 (2004, unpublished and on file with author) (hereinafter referred to as Asuagbor).

⁴²⁵ The modified version of the Securities Act entered into force on 16 May 2011.

⁴²⁶ Kenfack (n 101) above.

⁴²⁷ Dickerson (n 218) 17.

⁴²⁸ Ibid.

⁴²⁹ Nzalie 2002 *Presses Universitaire d'Afrique* 106-107 (hereinafter referred to as Nzalie).

⁴³⁰ Ibid.

members in companies have limited liability for the debts of the company.⁴³¹ In analysing the forms of business organisations, the relevant elements will be examined. The organisation of this section begins with limited liability companies, unlimited liability partnerships, and other forms of business organisations.

3.3.1.2.1 Commercial companies

Commercial companies otherwise called limited liability companies are divided into SA and SARL and are referred to as public and private limited companies respectively. Both types are known by their names, followed in legible characters by the letters “PLC”⁴³² for SA and “PC” for SARL. These are companies in which shareholders’ liability is limited to the amount of their shareholdings,⁴³³ and they can be singly formed by a sole proprietor. However, SAs and SARLs⁴³⁴ are distinct in concept and their amounts of the share capital. A SARL is a private limited company⁴³⁵ with a minimum share capital of 1.000.000 CFA, divided into shares of at least 10.000 CFA.⁴³⁶ It is managed by a manager(s) appointed either in the Articles of Association, or by a majority shareholder holding at least one half of the share capital of the company.⁴³⁷ It is increasingly adopted in the African states by small and medium size enterprises.⁴³⁸

An SA on the other hand, is a public limited company⁴³⁹ with a minimum share capital fixed at 10.000.000 CFA divided into shares of at least 10.000 CFA.⁴⁴⁰ It is the most common type of company used by foreign investors for large investments because of its

⁴³¹ Ibid.

⁴³² Art 386 *Companies Act*.

⁴³³ Ibid, art 310.

⁴³⁴ Ibid, art 309.

⁴³⁵ Ibid.

⁴³⁶ Ibid, art 311. The one million CFA is equivalent to 16,000 Rands.

⁴³⁷ Ibid, art 323.

⁴³⁸ Ebanga “OHADA, pratique du droit des sociétés commerciales: La société a responsabilité limitée” 2007 *Presses Universitaires Libres* 19 (translated as *OHADA, practice on commercial companies: Private limited company*).

⁴³⁹ Art 385 *Companies Act*.

⁴⁴⁰ Ibid, art 387. The ten million CFA is equivalent to 161,000 Rands. This provision is an innovation for Anglophone Cameroon.

suitability and resulting benefits. It is administered either by a board of directors that is chaired by a chairperson,⁴⁴¹ or a general administrator.⁴⁴² Both organs of management are appointed by the shareholders in a general assembly.⁴⁴³

An SA is obligatorily administered by a board of directors when the number of shareholders exceeds three and by a general administrator when there is only one shareholder.⁴⁴⁴ The board of directors consists of not less than three and not more than 12 directors appointed from shareholders and non-shareholders of the company. A worker may be appointed as a director when his contract of employment corresponds to an effective job. In other words, any worker with a permanent contract of employment may be appointed as a director, unless otherwise provided for in the Articles of Association.⁴⁴⁵ The line between the powers of the board of directors and general administrator is blurred. As a result, there is confusion between the powers of the board of directors and those of the general administrator. This problem can be resolved by the decision-makers, clearly defining the two types of management. Nevertheless, both organs are endowed with wide corporate powers to be exercised in all circumstances in the name of the company, within the limits of the company's objects and those defined by the general assembly of shareholders.⁴⁴⁶

The question that arose before the CCJA was whether it is possible for an SA to appoint a vice president in the management of a commercial company.⁴⁴⁷ The CCJA answered in the negative.⁴⁴⁸ According to the CCJA, it would be impossible to institute an organ without contravening the provisions of Article 909 of the Companies Act.⁴⁴⁹ Koné thinks differently; to him, by virtue of the principle of contractual liberty, the parties to a contract

⁴⁴¹ Ibid, art 462.

⁴⁴² Ibid, art 415.

⁴⁴³ Ibid, art 429.

⁴⁴⁴ Oumar and Mamadou (2008) 1547 (hereinafter referred to as Oumar and Mamadou).

⁴⁴⁵ Art 426 Companies Act.

⁴⁴⁶ Ibid, arts 435, 465 and 487.

⁴⁴⁷ It is a request made by the Government of Senegal.

⁴⁴⁸ CCJA Advisory opinion No. 002/2000/EP of 26 April 2000.

⁴⁴⁹ Ibid. Art 909 provides "The purpose of harmonisation shall be to repeal, amend and replaced, where necessary, the provisions of Articles of Association contrary to the mandatory provisions of this Uniform Act and to include therein the supplement warranted by this Uniform Act".

should be able to create organs not provided for in the Act.⁴⁵⁰ However, it is submitted that such a liberty will defeat the very purpose of Article 909 of the Companies Act.

3.3.1.2.2 Partnerships

The Companies Act establishes two forms of partnerships - the SNC and the SCS. The SCS is another OHADA innovation that did not exist in the member states prior to this Act. Though SNC is translated as a private company,⁴⁵¹ it is an ordinary or general partnership, while SCS is translated as a sleeping partnership or a limited partnership. The SNC and the SCS are unlimited liability partnerships in which partners are jointly and severally liable for the debts of the partnership. Unlike SCS, the death of a partner in an SNC results in the dissolution of the partnership, unless otherwise provided in the partnership statute or Articles of Association. While an SNC is preceded by the words “ordinary partnership”, an SCS is preceded by “sleeping partnership”.⁴⁵²

SNC is an ordinary partnership in which partners have the status of traders. Partners are accorded the status of traders merely because of their participation in the partnership.⁴⁵³ SCS is composed of both active partners and sleeping partners known in French as “*associés commandités*” and “*associés commanditaires*” respectively. Active partners play an active role in the management of the partnership⁴⁵⁴ while sleeping partners, whose liabilities are limited only to the amount of their contribution,⁴⁵⁵ do not take part in the management of the partnership. An SCS must always have an active partner, in the absence of which the partnership will not be concluded.⁴⁵⁶

⁴⁵⁰ Koné (n 413) 140.

⁴⁵¹ Art 270 *Companies' Act*. See Pougou *et al* “OHADA commercial law and economic interest group” 1998 *African University Press* 435-595.

⁴⁵² Idris “Harmonisation of business laws in Africa – An insight into the laws, issues, problems and prospects” in Dickerson (2009) 35-36.

⁴⁵³ See art 221-1 *French Companies Act* 1 August 1967.

⁴⁵⁴ Art 296 and 298 *Companies' Act*.

⁴⁵⁵ *Ibid*, art 293.

⁴⁵⁶ *Ibid*, art 308.

3.3.1.2.3 Other forms of business organisations

Under this heading, business organisations which are neither a company nor partnership are discussed, namely GIE, *société en participation*, and *société de fait*. To begin with, GIE was originally created by the French company law and has subsequently been adopted into European law. It is an innovative legal entity for the majority of OHADA member states and a useful type because it creates the opportunity for African companies to cooperate and share knowledge in the face of international competition. It also facilitates and develops the economic activities of its members.⁴⁵⁷ It is more of a partnership wherein members are severally and jointly liable for its debts unless otherwise agreed with any third party with which it contracts.⁴⁵⁸ Generally, it is formed by firms operating on the same line of production, for example, by cocoa producers for the purpose of sharing cocoa production facilities or by oil companies for the purpose of sharing oil exploration equipment or storage tanks. A GIE is managed by one or more directors, and where a legal entity is a director, a natural person is appointed as its representative.⁴⁵⁹ It is bound by the acts of its directors that fall within its scope and substratum. Like all other business organisations, it may be transformed into an SNC and wound up by a court order upon the death of a member unless the terms of contract provides otherwise.⁴⁶⁰

A joint venture (*société en participation*) does not have a registered office. It cannot be a party to court proceedings or be subjected to collective insolvency proceedings. It is more often referred to as a type of joint venture where the partners agree that it will not be registered, and as such will not have its own corporate identity.⁴⁶¹ It is a flexible instrument in which partners freely determine their rights, the rules for the functioning and winding-up of the entity, and freely contract with a third party. In principle, the relationship between partners is governed by the provisions applicable to SNCs.⁴⁶² In spite of the freedom that partners possess; they must comply with the mandatory rules

⁴⁵⁷ Ibid, art 869.

⁴⁵⁸ Ibid, art 872.

⁴⁵⁹ Ibid, art 879.

⁴⁶⁰ Ibid, art 882.

⁴⁶¹ Ibid, art 854.

⁴⁶² Ibid, art 856.

laid down in the general provision of the Companies Act.⁴⁶³ A de facto entity (*société de fait*) is an organisation in which individuals act as if they were in a partnership.⁴⁶⁴ The existence of such an organisation must be confirmed by the court, failing which the rules applicable to the shareholders in an SNC will apply.

3.3.2 The Uniform Act on collective proceedings for the writing off debts

The Insolvency Act relates to the insolvency of commercial companies registered in the territory of the member states, with the exception of a joint venture. Although anglophone Cameroon adopted a common law system,⁴⁶⁵ the provisions on insolvency in the respective jurisdictions are in *pari-materia* with the provisions in the other contracting states. Hence, the legal basis for the settlement of insolvency disputes in the contracting states is the OHADA Insolvency Act, and it is largely considered as it stands today. The purpose of this Act is to avert the insolvency of debtors who are under threat of insolvency, to liquidate insolvent companies that cannot be rescued, and to give financially troubled but economically viable enterprises a second chance through corporate rescue procedures.⁴⁶⁶ The Act is composed of 258 articles divided into eight titles of unequal dimensions.⁴⁶⁷ In contrast to other models, the Insolvency Act is not a comprehensive piece of legislation as it does not provide for both personal and corporate insolvencies. It is still uncertain whether unitary legislation will be adopted in the near future to provide for all types of debtors.

In the words of Article 25 of the Insolvency Act, insolvency refers to the “inability of a debtor to settle his current liabilities with his available assets”.⁴⁶⁸ To this end, the Act offers contracting states three types of collective procedures.

⁴⁶³ Ibid, art 855.

⁴⁶⁴ Ibid, art 868. See the Fako High Court case of *AWC Njikam v Chief RN Namme*, suit HCF/65/02-03.

⁴⁶⁵ Tumnde “OHADA as experienced in Cameroon: Addressing areas of particular concern to common law jurists” in Dickerson (2009) 70.

⁴⁶⁶ Wessels “Insolvency in the Middle East and Africa” 2010 *Quarterly Journal of INSOL International Fourth Quarter* 14. The Insolvency Act provides for different types of corporate rescue procedures. To mention a few, it provides for partial transfer of assets, debt cancellation, layoff of workers and management lease; art 16 Insolvency Act.

⁴⁶⁷ Sawadogo 2004 <http://www.ohada.com> at 6 (hereinafter referred to as Sawadogo).

⁴⁶⁸ See (<http://www.jurisint.org/ohada/text.06.en.html>); accessed 18 May 2011). The OHADA adopts a balance sheet insolvency.

3.3.2.1 *Collective insolvency procedures*

The OHADA Insolvency Act reflects in its key points French national insolvency law as it was in the mid 1990's.⁴⁶⁹ It provides for three different types of collective procedures namely, preventive settlement procedure, administration, and liquidation procedures otherwise called insolvency procedures.⁴⁷⁰ These procedures apply to any natural or corporate body with the status of a trader, any non-trading corporate body, partnerships and any public or private corporation.⁴⁷¹ In other words, they apply to persons with the status of a trader⁴⁷² excluding individuals, utility companies, and insurance companies.⁴⁷³ The collective nature of the proceedings implies a stay of individual proceedings by creditors against the property of the debtor.⁴⁷⁴ This is to ensure an orderly and equitable distribution of the debtor's assets. The principle of equality between creditors is the preoccupation of insolvency practitioners in the treatment of international collective proceedings.

This principle of equality is manifested through a number of rules, as follows. The first relates to the right of creditors to prove their claims in any of the proceedings, whether principal or secondary proceedings;⁴⁷⁵ this relieves poor creditors from having to prove their claims in foreign jurisdictions. The second rule relates to the principle of restitution in terms of which a creditor, who has received payment in one proceeding, is required to return to the administrator or liquidator what he obtained.⁴⁷⁶ Accordingly, a creditor who receives payment in one proceeding may not participate in other proceedings open in other states relating to the same debtor, unless creditors of the same rank have

⁴⁶⁹ Wessels 2006 *Elgar Encyclopaedia of Comparative Law* (n 396) above.

⁴⁷⁰ Art 2 *Insolvency Act*.

⁴⁷¹ *Ibid*.

⁴⁷² Art 2 *General Commercial Law* define traders as "persons whose regular occupation is to carry out commercial transactions" while art 3 defines commercial transactions as including "the purchase of movable or immovable property for resale, banking, stock and currency exchange, brokerage and transit transactions and the industrial exploitation of mines, quarries and any natural resource deposit ..."

⁴⁷³ Insurance companies are regulated by the Inter-African conference on Insurance (CIMA) Code of 10 July 1992 as amended by Regulation 0002/CIMA/PCMA/CE/SG/2007 of 15 October 2007.

⁴⁷⁴ Arts 72 and 75 *Insolvency Act*.

⁴⁷⁵ *Ibid*, art 253.

⁴⁷⁶ *Ibid*, art 250 (1).

received an equivalent dividend.⁴⁷⁷ This is to prevent preferential treatment of creditors. The third rule relates to the transfer of surplus from one proceeding to another;⁴⁷⁸ this happens in the case of multiple proceedings where proceedings relating to the same debtor are open in a number of countries.⁴⁷⁹

In principle, employees enjoy priority rights over other creditors for any outstanding wages and salaries due under their contracts of employment.⁴⁸⁰ Given that there is no redundancy or wage guarantee fund for the payment of employees, the amount is paid from the proceeds of the insolvent estate, and it is determined by the national employment law of the member states. Employees are followed by secured creditors and then unsecured creditors.⁴⁸¹

However, it must be acknowledged that the granting of these collective procedures will depend on the financial situation of the debtor as envisaged in the expert's report.⁴⁸² The fact is that the debtor must be at the verge of insolvency, or under threat of insolvency, before it can apply for such a preventive settlement proceeding. This is evidenced by the debtor's financial statement and the expert's report. If actions of this sort become endemic, a preventive settlement order will be granted. The Batoula (Pty Ltd) Company of Cameroon⁴⁸³ at the time of application of the preventive settlement order, had debts in the sum of 1,068,095,834 CFA franc (approximately US\$ 2,200,000). Upon receipt of the application⁴⁸⁴ and investigation by the appointed expert (Yimgnia Crispin), the company was subjected to a preventive settlement proceeding.⁴⁸⁵

⁴⁷⁷ Ibid, art 255.

⁴⁷⁸ Ibid, art 256.

⁴⁷⁹ Leno "National report for Cameroon" in Faber *et al* (eds) *Commencement of insolvency proceedings* (2012) 120.

⁴⁸⁰ Arts 95 and 96 *Insolvency Act*.

⁴⁸¹ Ibid, arts 166-167.

⁴⁸² An expert is not an insolvency practitioner but a judge appointed by the president of the competent court to investigate into the economic and financial situation of a debtor before the granting of any of the collective procedures.

⁴⁸³ It is a public limited company created in 1974 with registered office in Cameroon. It manufactures leather shops, foam and whipped cream.

⁴⁸⁴ The debtor submits the application for the granting of a preventive settlement proceeding.

⁴⁸⁵ See the High Court of Wouri, Douala order 845/PTGI/W/DLA of 17 December 2008 and Civil

The granting of a preventive settlement order suspends all pending lawsuits, except pending lawsuits relating to “employees due wages” or acknowledgements of rights or disputed debts.⁴⁸⁶ It also prohibits the debtor from making any payment, or redeeming any securities, except with the authorisation of the president of the competent court.⁴⁸⁷ The granting of preventive settlement proceedings enables a debtor to improve its financial situation, and to get back on its feet again. It is pertinent to note that preventive settlement proceedings may only be instituted by a debtor once every five years.⁴⁸⁸ Although the Insolvency Act does not state the rationale for this limitation, it would seem that it is aimed at preventing abuse by unscrupulous debtors, and protecting creditors.⁴⁸⁹

On the other hand, the granting of insolvency orders is in respect of insolvent debtors,⁴⁹⁰ that is, against debtors who are unable to meet their liabilities with their available assets (balance sheet insolvency).⁴⁹¹ The difference between the insolvency orders lies in the purpose for which they are designed. Liquidation procedures are designed for the realisation of an insolvent debtor’s assets to satisfy his creditors’ claims, while an administration procedure (*redressement judiciaire*) is designed to rescue financially troubled debtors who are capable of survival. According to Owusu-Ansah,⁴⁹² the administration procedure “has the effect of placing the debtor under “compulsory assistance” for the administration and disposal of his property”.⁴⁹³ The administration procedure takes effect from the date of its pronouncement, as it does in France.⁴⁹⁴ Any objection or appeal to the procedure is made within 15 days, starting from the date of publication of the judgement.⁴⁹⁵ In the *Sonsbhy v Tanguit Petroleum*

Judgment of 27 May 2009.

⁴⁸⁶ Arts 8, 12 and 22 *Insolvency Act*.

⁴⁸⁷ *Ibid*.

⁴⁸⁸ *Ibid*, art 5.

⁴⁸⁹ Leno “National report for Cameroon” 120-121 (hereinafter referred to as Leno).

⁴⁹⁰ Art 25 *Insolvency Act*.

⁴⁹¹ *Ibid*.

⁴⁹² Awusu-Ansah 2004 <http://www.iiiglobal.org/component/downloads/finish/398/1555.html> at 4-6 (hereinafter referred to as Awusu-Ansah).

⁴⁹³ Arts 35-36 *Insolvency Act*.

⁴⁹⁴ *Ibid*, arts 52 and 2 of *French Decree* 21 of 1988.

⁴⁹⁵ Arts 216-225 *Insolvency Act*.

Company case,⁴⁹⁶ the Court of Appeal of Ouagadougou rejected an appeal for non-compliance with the deadline.

3.3.2.2 *International collective procedures*

The international collective provisions are part of the Insolvency Act, applicable only in the event of cross-border disputes. The essence therefore is to facilitate cooperation between the member states and the tasks of the liquidator or administrator. It is worth mentioning that these provisions are inspired by several international instruments such as the European Convention on Insolvency Proceedings,⁴⁹⁷ the European Convention on Certain International Aspects of Bankruptcy,⁴⁹⁸ the Model law,⁴⁹⁹ and the EU Regulation on Insolvency Law.⁵⁰⁰ A cross-border dispute sets in when the debtor has assets across a number of jurisdictions, and when this happens there will only be one set of proceedings - referred to as the “primary collective proceedings”.

If a primary collective proceeding is in one country, the judgment instituting the proceedings shall have the effect of *res judicata* on the territory of the other member states.⁵⁰¹ Creditors in other member states are entitled to institute their claims in that country,⁵⁰² and the insolvency practitioner (administrator or liquidator) may exercise his powers in any of the member states, as long as no other collective proceedings have been initiated in that state;⁵⁰³ this is to ensure that local and international creditors are protected. However, the commencement of primary collective proceedings does not bar the commencement of “secondary collective proceedings”.⁵⁰⁴ For example, if a debtor

⁴⁹⁶ Judgment 39/2002 of 5 April 2002.

⁴⁹⁷ It did not enter into force due to a member's failure to ratify it. However, it is superseded by the current Council Regulation 1346/2000 of 29 May 2000 on Insolvency Proceedings.

⁴⁹⁸ Council of Europe 5 June 1990.

⁴⁹⁹ 30 May 1997. See (http://www.iiiglobal.org/organisations/uncitral/model_law2.pdf; accessed 4 March 2012).

⁵⁰⁰ *European Union (EU) Regulation 1346/2000 of 29 May 2000 on Insolvency Proceedings.*

⁵⁰¹ Art 247 *Insolvency Act*.

⁵⁰² Regarding distribution any surplus realised from one proceeding must be transferred or handed over to administrators or liquidators in other insolvency proceedings; art 256 *Insolvency Act*. Thus, a creditor who has received payment in one proceeding say in principal proceeding is not allowed to receive payment in secondary proceedings until after payment of other creditors of the same class of preference; art 225 *Insolvency Act*.

⁵⁰³ *Ibid*, art 249.

⁵⁰⁴ *Ibid*, art 251.

has his registered office in Cameroon and branches in Côte d'Ivoire and Senegal, primary collective proceedings will be opened in Cameroon and secondary collective proceedings in Senegal and in Côte d'Ivoire respectively.

The case of *Attiba Dennis & others v Multinational Air Afrique Companies & others*⁵⁰⁵ is a “landmark victory for the OHADA initiative and marks the beginning of confidence in the [Insolvency Act]”.⁵⁰⁶ *Air Afrique*, a multinational airliner, was the pride of Africa with over 46,000 employees. It was owned by 11 OHADA member states,⁵⁰⁷ Air France, the French Development Agency and three private stockholders.⁵⁰⁸ The company experienced severe financial difficulties due to poor management and badly negotiated Airbus lease agreements. In an attempt to keep the company running, the 11 member states met with the WB to devise modalities for assistance, but this yielded no result because the WB suggestions of privatisation and restructuring were not accepted by the member states.⁵⁰⁹ Air France suggested renaming the company (New Air Afrique) and bringing in new investors,⁵¹⁰ but this was found to be complicated and was rejected.⁵¹¹ In accordance with Article 25 of the Insolvency Act, the company filed for bankruptcy⁵¹² in Abidjan where it had its centre of administration. In consideration of the fruitless rescue attempts and the degree of indebtedness of the company, the court decided on liquidation.⁵¹³ This declaration of the court was binding on the rest of the member states in which the company had assets.

In a nutshell, OHADA adopts an effective and efficient insolvency regime with effective procedures inconsistently applied by those responsible for its implementation.

⁵⁰⁵ CCJA 7 February 2002.

⁵⁰⁶ Awusu-Ansah (n 492) 7.

⁵⁰⁷ Benin, Burkina Faso, Central African Republic, Chad, Congo, Côte d'Ivoire, Mali, Mauritania, Niger Senegal and Togo.

⁵⁰⁸ The 11 member states were the majority shareholders with 68.4% stake in the company, Air France 12%, French Development Agency 9% and 10.6% for the shareholders.

⁵⁰⁹ Awusu-Ansah (n 506) above.

⁵¹⁰ See <<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/ADB-BD-IF-99-310-EN-MULTINATIONAL-PCR-MULTINATIONAL-COMPANY-AIR-AFRIQUE-REINFORCEMENT-PROJECT.PDF>>; accessed on 1 May 2013).

⁵¹¹ BBC 'Air Afrique wound-up'; http://www.airliners.net/aviation-forums/general_aviation/read.main/545737; accessed 16 October 2011).

⁵¹² See (n 505) above.

⁵¹³ Judgment 04/2004 of 8 January 2004. See art 32 *Insolvency Act*.

Nevertheless, there is no framework on the appointment of persons responsible for the administration of insolvent estates titled “liquidators and administrators”. There is equally no framework on the remuneration of “liquidators and administrators”. Based on the complexity of insolvency proceedings, it is desirable for the insolvency practitioner to be an appropriately qualified person, with experience and knowledge of the law and related fields such as finance, business law, and accounting.⁵¹⁴ The author further suggests for the adoption of a commission-based system wherein practitioners’ would receive commission for services rendered in the administration of the insolvent estate.⁵¹⁵

3.3.3 The draft Uniform Act on labour/employment

The subject of employment is a very sensitive one, because it involves not only employees but also companies and society as a whole. There has been much debate on whether an employment law should be included within the scope of business law. Vogel-Poskey⁵¹⁶ remarks that: “Social measures are intrinsically as important as economic measures because social equilibrium is necessary for economic growth”. According to him, the non-adoption of a labour law might jeopardise the social equilibrium that is necessary for economic growth. In 2006, a final draft for a labour code entitled “*avant-projet d’acte uniforme OHADA en matière de droit de travail*”⁵¹⁷ was completed.⁵¹⁸ It is composed of 209 articles divided into ten titles, aimed at providing a safe context within which enterprises can function and create jobs within the sub-region.⁵¹⁹ According to Blackett, these objectives are consistent with the AU’s Plan of Action for Promotion of Employment and Poverty Alleviation.⁵²⁰

⁵¹⁴ Legislative Guide(n 202) above paras 39 at 175-180.

⁵¹⁵ See Ch 2 paras 2.5.2 above.

⁵¹⁶ Woolfrey 1991 *Indus. LJ* (n 57) above.

⁵¹⁷ 24 November 2006. See (www.ohada.com; accessed 4 September 2011).

⁵¹⁸ This is following its inclusion into the business agenda of the OHADA at a preparatory conference held in Libreville, Gabon on the 5-6 October 1992.

⁵¹⁹ Blackett “The paradox of OHADA’s transnational hard law, labour harmonisation initiative” in Blackett A and Levesque C (eds) *Social regionalism in the global economy* (2010) 252.

⁵²⁰ *Ibid.* The primary goal of AU’s plan is to reverse the current trends of pervasive and persistent poverty, unemployment on the continent... See <http://www.Africa-union.org>; accessed 19 October 2013.

The preparation of the draft code was driven by the national committees of member states with the collaboration of the trade unions, companies' representatives, and the International Labour Organisation (ILO).⁵²¹ It is essential to highlight that the draft code is not yet in force, thus making it difficult to discuss the enforceability of the rights enshrined therein. Nevertheless, it imposes the same rules on all employers and workers in the member states. Even though it is not yet in force, it is of utmost importance to understand the various aspects contained in the new draft Act.⁵²²

3.3.3.1 *Fundamental workers' right*

The draft contains fundamental rights that are to be incorporated by member states in their national laws and to be complemented by them. Some of these rights relate to the right to equal treatment between men and women; the right of association to any trade unions; the right not to be discriminated against on health-related matters; the right not to be sexually harassed; prohibition of child labour; the prohibition of every form of physical and psychological violence on a worker; and right to collective bargaining. The draft recognised the right to collective bargaining between trade unions and employers, the terms of which will prevail over provisions of the code if they are more favourable to employees. Article 13 provides for criminal sanctions in the event of non-compliance with the provisions.⁵²³

3.3.3.2 *Contract of employment*

The code regulates different types of contract of employment.⁵²⁴ These range from fixed-term contracts, to part-time contracts, apprenticeships, training contracts, and agency work. Unlike some Western countries, where fixed-term contracts are concluded

⁵²¹ See Beraud study title "Etude Prelable l'adoption d'un Acte Uniform en Droit de Travail dans le Cadre de l'OHADA"; see (<http://www.ilo.org/public/french/dialogue/ifpdia/downloads/papers/ohada.pdf>; accessed 12 November 2011) (translated as preliminary study on the adoption of the uniform Act on employment within the OHADA zone) hereinafter referred to as Beraud).

⁵²² Boni 'The flexibility of the labour market in sub-saharan Africa: Francophone countries, South Africa and Mozambique, comparative remarks' the European Report on Development (2010) 3 (hereinafter referred to as Boni).

⁵²³ Art 13 *Labour Code*.

⁵²⁴ Ibid, arts 20 and 21.

for a specific reason,⁵²⁵ under the code, they can be concluded for whatever reason for a period of two years that is renewable once. In effect, this means that a worker cannot work for more than four years for the same employer,⁵²⁶ after which the contract is rendered a contract of indefinite duration *ex tunc*. However, Article 22 of the Labour Code does not apply to seasonal workers or replacement workers, that is, workers who replace others who are on leave, and workers engaged for a day.⁵²⁷ Part-time contracts are concluded for a specified period of time.⁵²⁸ Unlike a fixed-term contract, a part-time contract must be in writing and concluded with the worker.⁵²⁹

An apprenticeship contract, on the other hand, is one reserved for OHADA nationals who have reached the legal working age of 15 years.⁵³⁰ Connected to this are traineeship contracts, which are contracts aimed at offering young graduates, students, and people the possibility to gain work experience and to acquire some professional skills. The actual content of an apprenticeship and training contract is left to the member states.⁵³¹ Agency work is a contract between a worker and a work agency on the one hand, and between a firm and the agency.⁵³² France is one of the first countries to have introduced such a contract (*travail interimaire*). It is a temporary contract concluded only when a worker is on maternity leave, or when a firm is facing a temporary increase of its productivity, and it is limited to two years with the same employer.⁵³³

3.3.3.3 Termination of employment

Contract of employment may only be terminated for legitimate reasons after written notice⁵³⁴ has been served to the worker concerned.⁵³⁵ However, if it is based on

⁵²⁵ Such contracts are usually concluded when there is an increase in the demand for goods; see Boni 2009 'The labour market regulation of the SEM Countries: A legal perspective, CARIM research report Series'; see (<http://cadmus.eul.eu/handle/1814/11848>; accessed 12 November 2011).

⁵²⁶ Art 22 *Labour Code*.

⁵²⁷ *Ibid*, art 24.

⁵²⁸ A part-time worker may only work for eight hours per week and two hours per day; art 82 *Labour Code*. However, supplementary hours may be requested at an extra fee.

⁵²⁹ Art 25 *Labour Code*.

⁵³⁰ *Ibid*, art 62.

⁵³¹ *Ibid*, art 66.

⁵³² *Ibid*, art 73.

⁵³³ *Ibid*, art 76.

⁵³⁴ In terms of art 42 of the *Labour Code*, member states are left to establish the modalities, the

legitimate reasons, a contract of employment may be terminated without notice or opportunity to the worker to present his defence.⁵³⁶ Economic dismissal results either from the transformation of work, economic difficulties, technological changes, or internal restructuring.⁵³⁷ In terms of Article 54, it must be effectuated in accordance with fair reasons and fair procedure (information and consultation procedures). Before a collective dismissal is effected, the employer must prepare a dismissal plan, stating the reasons for the dismissal and the workers affected. The specification of the type of workers affected is to enable the trade union to assess the legitimacy of the dismissal. What is striking though is the similarity between the OHADA Labour Code and the relevant EU regulations. An example is Article 54 of the OHADA Labour Code: where an employer is contemplating collective dismissal, he is required to begin consultations with the workers' representatives in good time with a view of reaching an agreement.⁵³⁸ The similarity between the OHADA Labour Code and the EU directive reveals the EU origins, particularly the French approach, of the code.

3.4 Conclusion

This chapter demonstrates that OHADA has established supranational institutions that best serve the purpose of the organisation. The supranational institutions operate at the regional level and do not interfere with the internal affairs of the member states. The chapter also demonstrates that OHADA has unified its commercial laws into one corpus of law, which is directly applicable in the member states concerned. It should be mentioned that there are changes in the Companies and Insolvency Acts that are yet to be implemented alongside the draft labour code.

Within the regulatory framework, the Companies Act provides a variety of companies from which an investor wanting to invest in the zone may choose from, with a clear legal

conditions and duration of the notice period.

⁵³⁵ Art 40 *Labour Code*.

⁵³⁶ In the case of serious misconduct and economic reasons as defined in each of the member states, indemnity may be ordered by the court in the case of serious misconduct and the amount of compensation does not exceed two months of the worker's salary.

⁵³⁷ Art 53 *Labour Code*.

⁵³⁸ Art 2 of *Council Directive 75/129* of 1975 as amended and consolidated in *Council Directive 98/59/EC* of 20 July 1998 relating to collective redundancies.

framework for the formation, functioning, and management of the companies. Unfortunately, the Companies Act does not distinguish between a company and a partnership, a problem which causes confusion in the minds of its readers.⁵³⁹ Turning to the Insolvency Act, OHADA provides for an efficient and effective insolvency regime with effective procedures which are predictable and transparent. It is not a comprehensive piece of legislation in the sense that it does not deal with both personal and corporate insolvency. The Act adopts a debtor-in-possession corporate rescue procedure, whereby the debtor is not displaced and is subject to compulsory assistance. The insolvency framework specifies the criteria for commencement of insolvency proceedings and the capacity of persons to commence insolvency proceedings. As mentioned above, the Insolvency Act lacks a regulatory framework.⁵⁴⁰ Turning to the draft labour code, it has no direct effect in the member states, and therefore member states continue to apply national employment laws.

The success of OHADA is attributed to a number of factors. The common colonial history of its member states is one factor behind its success. Apart from a vestige of Cameroon that was colonised by the British,⁵⁴¹ the rest of the OHADA member states were colonised by France. As a result, the French imparted on its colonies French laws on which OHADA is largely based. Added to this, is the present dominance of the French language and civil law tradition inherited from France.⁵⁴² However, this is expected to change over time as OHADA embraces other African countries.⁵⁴³ Another factor pertaining to the common usage of the CFA franc (*Cooperation Financière en Afrique franc zone*). With the exception of Guinea and Comoros, the rest of the member states use the CFA franc as their currency.

⁵³⁹ Paras 3.3.1.2 above.

⁵⁴⁰ Paras 3.3.2.2 above.

⁵⁴¹ This refers primarily the North and South West Provinces of Cameroon.

⁵⁴² Bourque (n 128) above.

⁵⁴³ Art 53OHADA treaty.

CHAPTER 4: The SADC Legal Framework and Some Comparisons with OHADA's Legal Framework

4.1 Introduction

This chapter compares the legal framework of the SADC with that of OHADA with a view to demonstrating the important differences and similarities. This is valuable because it enables the reader to see similarities and differences between the legal frameworks. The provisions of the treaties establishing the SADC⁵⁴⁴ and OHADA⁵⁴⁵ constitutes the legal basis and framework for achieving the SADC and OHADA's mission.⁵⁴⁶ The mission of OHADA and the SADC are different. While OHADA operates a uniform commercial legal system, the SADC does not and, consequently, no attempt has been made to unify the commercial laws or private international rules of member states. This invariably means that in the event of a cross-border dispute, economic operators will be subject to diverse national laws. It is important for the SADC to reinforce legal certainty by developing a uniform commercial legal system governing business activities in the community. This gives rise to the question: Is there a need for a uniform commercial law structure in the SADC?

This chapter assumes that effective and supranational institutions are imperative for the development of a uniform commercial law structure in the SADC. In this regard, the main thrust of this chapter is to carry out an analysis of the SADC's structure. This will entail an analysis on the powers and competences of the main institutions with a view to determining whether a uniform commercial law approach can be achieved within the current SADC structure. This refers primarily to the institutions created by the SADC treaty.⁵⁴⁷ A descriptive approach will be adopted in order to lay the basis for a comprehensive analysis of the SADC institutional structure.

⁵⁴⁴ The treaty establishing the Southern African Development Community (hereinafter referred to as the SADC) was signed in Windhoek, Namibia on 17 August 1991 and amended in August 2001 (hereinafter referred to as the SADC treaty).

⁵⁴⁵ The OHADA treaty.

⁵⁴⁶ Art 5 SADC treaty and art 1 OHADA treaty.

⁵⁴⁷ Ibid, art 9 (1).

The value of this chapter lies in the insight it provides on the roles of the SADC institutions in the integration process, of the basic concepts such as “transfer of power”, “sovereignty”, “inter-governmentalism” and “supranationalism”, all of which are important to understand the powers of international organisations and the need it raises for the development of uniform commercial legislation in the SADC.

4.1.1 The Basic Structure of the Southern African Development Community (SADC)

The SADC is an international organisation with a legal identity distinct from its member states.⁵⁴⁸ The legal identity concept is defined as “the actual attribution of rights and duties on the international plan”.⁵⁴⁹ The concept is central to the understanding of the powers of a corporation or international organisation. In the territory of its member states, the SADC enjoys such legal capacity and power to “enter into contracts, acquire, own or dispose of movable or immovable property and to sue and be sued”.⁵⁵⁰ It is significant to note that such powers may only be exercised in the territory of the member states.⁵⁵¹ Should the SADC wish to exercise its powers in a third party state, then it must do so in accordance with the laws of the third party state.

It is also described as a “treaty-based organisation”,⁵⁵² in the sense that it was established within the framework of an agreement between the Southern African states⁵⁵³ that are in the process of linking their economies more closely, to some extent, and that co-operate on various policy levels, be it human rights, political or social.⁵⁵⁴ The treaty constitutes the legal basis and framework for achieving the SADC’s mission. The treaty is not self-executing in that it is not directly applicable in the domestic jurisdiction of the member states, and as such does not form part of the internal legal

⁵⁴⁸ Ibid, art 3 (1).

⁵⁴⁹ Shaw *International law* (1997) 194.

⁵⁵⁰ Art 3 SADC treaty.

⁵⁵¹ Ibid, art 3 (2).

⁵⁵² Sands and Klein *Bowette’s law of international institutions* (2009) 16.

⁵⁵³ The SADC comprises of the following states: Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

⁵⁵⁴ Kruger 2008 *De Jure* 306 (hereinafter referred to as Kruger).

order of the member states. Instead, signatory states are required to take all steps necessary to accord the treaty the force of national law and to ensure the uniform application of the treaty.⁵⁵⁵

The present treaty shall be ratified by the signatory states in accordance with their constitutional procedures.⁵⁵⁶ Apparently, once a treaty is approved, signed or ratified, a signatory state cannot invoke internal law to overrule its consent to be bound by the treaty.⁵⁵⁷ What is striking though, is that the SADC member states do not have a common legal tradition,⁵⁵⁸ language, currency, or uniform commercial legislation.⁵⁵⁹ These may all be questions which come to mind when an investor or economic operator wants to invest in a region.⁵⁶⁰ These differences are reflected in Table 4.1 below.

Table 4.1: Legal systems, language and currency regimes in the SADC⁵⁶¹

Country	Legal system	Official Language	Currency (Means of Exchange)
Angola	Civil Law	Portuguese	New Kwanza
Botswana	Roman Dutch Law and Common Law	English	Pula
The Democratic Republic of Congo (DRC)	Civil Law	French	Congolese Franc
Lesotho	Roman-Dutch Law	English	Maluti pegged with South African Rand

⁵⁵⁵ Art 6 (4) and (5) SADC treaty.

⁵⁵⁶ Ibid, art 40. The treaty shall enter into force 30 days after the deposit of the instruments of ratification by two thirds of the member states.

⁵⁵⁷ Dugard *International law: A South African perspectives* (2005) 406.

⁵⁵⁸ Mancuso "Legal integration in the SADC region: A methodological approach" 4 (2010, unpublished and on file with author) (hereinafter referred to as Mancuso).

⁵⁵⁹ Chinsinga "The challenges of globalization and regional integration: The case of the Southern African Development Community" in Milazi M *et al* (eds) *Democracy, human rights and regional co-operation* (2002) 115-125.

⁵⁶⁰ Kurt "The national bankruptcy Act and the conflict of laws" 1946 *Harvard Law Review* 1025-1059.

⁵⁶¹ Source: Author's composition.

Madagascar	Civil Law	French and Malagasy	Ariary
Malawi	Common Law	English	Kwacha
Mauritius	Civil and Common Law	English	Mauritian Rupee
Mozambique	Civil Law	Portuguese	Metical
Namibia	Roman-Dutch Law and Common Law	English	Namibian Dollar pegged with South African Rand
Seychelles	Common Law	Creole, English and French	Seychelles Rupee
South Africa	Roman-Dutch Law and Common Law	English, Afrikaans, IsiNdebele, IsiXhosa, IsiZulu, Sesotho Leboa, Sesotho, Setswana, SiSwati, Tshivenda, Xitsonga	Rand
Swaziland	Roman-Dutch Law and Common Law	SiSwati and English	Lilangeni pegged with South African Rand
Tanzania	Common Law	English and Kiswahili	Tanzanian Shilling
Zambia	Common Law	English	Kwacha
Zimbabwe	Roman-Dutch Law and Common Law	English	Zimbabwean Dollar pegged with South African Rand

This heterogeneity is not only reflected in the legal systems, language, and currency regimes in the community,⁵⁶² but also in the commercial laws of the member states, which according to Oppong⁵⁶³ is “a reflection of the different legal traditions in the region”. This diversity is compounded by the fact that the SADC states are not parties to an international convention on the harmonisation of their commercial laws. Speaking in the context of the harmonisation of the company laws of the EU member states, Ficker stated that:

Differences in the member states’ legislative and administrative provisions affect the establishment or functioning of the common market. They hamper the free circulation of goods, persons and capital, provoke distortion in competition making unequal the burdens on the competing national industries and are, therefore, obstacles for the development of the common market to the same extent as the maintenance of tariff borders or of different national policies in the various economic fields. Therefore, these differences have to be abolished.⁵⁶⁴

In fact, the differences in states’ legislative provisions should be harmonised because it is wasteful. It engenders increased transaction cost, uncertainty in the applicable law and in the recognition and enforcement of foreign judgments, which in turn may drive away investors. It also raises “considerable problems for policy and programme coordination”.⁵⁶⁵ With regard to this shortcoming, and the large volume of cross-border transactions enabled by movement of goods and services, persons,⁵⁶⁶ and capital, it is necessary for the SADC to develop uniform commercial legislation⁵⁶⁷ to facilitate investment and to regulate cross-border disputes. Enacting these provisions will take away present uncertainty regarding the scope of existing national legislative provisions, and will restore investors’ confidence.⁵⁶⁸ It will also make it easier to identify the

⁵⁶² Ruppel and Bongamwabo “The SADC Tribunal: A legal analysis of its mandate and role in regional integration” 2008 *Southern African Yearbook* 26.

⁵⁶³ Oppong (n 23) 915.

⁵⁶⁴ Fletcher *Conflict of laws and European community law* (1982) 7.

⁵⁶⁵ Nangela (n 29) 22.

⁵⁶⁶ Even though there is free movement of persons within the SADC, the member states have not yet harmonised their laws, policies and procedures. See Economic Commission for Africa (ECA) Southern Africa office 2009 <http://www.uneca.org/sa/documents/Population.pdf> at 13 (hereinafter referred to as ECA 2009).

⁵⁶⁷ Sayi *Harmonisation of insolvency law in East African Community* 23 (hereinafter referred to as Sayi).

⁵⁶⁸ Wessel (ed) *Cross-border insolvency: International instruments and commentary* (2007) 9.

applicable law, to expedite determination of cases, and save time and resources in the resolution of disputes.⁵⁶⁹

4.1.2 *The goals and objectives of the SADC*

The SADC's underlying objective is "to foster regional development and integration on the basis of balance, equity and mutual benefit"⁵⁷⁰ in order to promote:

- sustainable development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration;
- evolve common political values, systems and institutions;
- promote and defend peace and security;
- promote self-sustaining development on the basis of collective self-reliance, and the interdependence of member states;
- achieve complementarity between national and regional strategies and programmes;
- promote and maximise productive employment and utilisation of resources of the region;
- achieve sustainable utilisation of natural resources and effective protection of the environment; and
- strengthen and consolidate the long standing historical, social and cultural affinities and links among the peoples of the region.⁵⁷¹

The major milestones of the SADC's regional integration agenda as spelled out in the Regional Indicative Strategies Development Plan (RISDP)⁵⁷² is as follows:

Table 4.2: The SADC's Regional Integration Agenda⁵⁷³

Agenda	Free Trade Area (FTA)	Customs Union	Common Market	Common Monetary

⁵⁶⁹ Sayi (n 567) above.

⁵⁷⁰ Art 21 (1) SADC treaty.

⁵⁷¹ Ibid, art 5. See 'Profile: Southern African Development Community (SADC)' (<http://www.africa-union.org/recs/sadcprofile.pdf>; accessed 18 June 2012). See also Hess *SADC: Towards a Free Trade Area* in Hartzenberg T *SADC-EU trade relations* (2000) 33.

⁵⁷² The RISDP was adopted by the Council of Ministers of the SADC in August 2003 as a blueprint for regional integration in the SADC; See (<http://www.tralac.org/2012/04/18/the-regional-indicative-strategic-development-plan-sadcs-trade-led-integration-agenda/>; accessed 16 February 2013).

⁵⁷³ Source: Author's composition.

				Union
Year of realisation	2008	2010	2015	2018
Comment	Not realised	Postponed	/	/

As indicated above, the Free Trade Area (FTA)⁵⁷⁴ was to be attained in 2008 through elimination of all tariff and non-tariff barriers, but to date, an FTA has not been realised. This is largely attributed to inadequate customs infrastructure and the failure of some member states to fulfill their tariff elimination schedules. The DRC, Seychelles and Angola have been unable to fulfill their commitments and consequently have not joined the FTA. Thus, plans to achieve a customs union⁵⁷⁵ have been postponed as well as the establishment of a common market⁵⁷⁶ and monetary union.⁵⁷⁷

Article 5(2) of the SADC treaty sets out the strategies for achieving these goals. By virtue of Article 5(2), the SADC is to *inter alia*:

⁵⁷⁴ In terms of arts XXIV of the General Agreement Trade and Tariff (GATT), a FTA is understood to mean "a group of two or more customs territories in which the duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the constituent territories in products originating in such territories".

⁵⁷⁵ It is an area wherein member states impose common tariffs on non-members; see art XXIV para 8 GATT.

⁵⁷⁶ A common market area is one that allows free movement of factors of production such as capital and labour across national borders within the integration area.

⁵⁷⁷ Economic Commission for Africa (ECA) *A framework for mainstreaming regional integration in national development plans in the Southern Africa Development Community* (2009) 4.

- harmonise political and socio-economic policies and plans of member States;
- encourage the people of the region and their institutions to take initiatives to develop economic, social, and cultural ties across the region, and to participate fully in the implementation of the programmes and objectives of SADC; and
- create appropriate institutions and mechanisms for the mobilisation of the requisite resources for the implementation of programmes and operations of SADC and its institutions.⁵⁷⁸

In fulfilling the above objectives, the SADC states are required to take all measures necessary to promote the achievement of the objectives.⁵⁷⁹ In so doing, they may negotiate protocols as may be necessary in each area of co-operation.⁵⁸⁰ Article 21 (3) highlights the areas in which member states have agreed to cooperate. They include: food security; land and agriculture; infrastructure and services; industry, trade, investment, finance and mining; social welfare; information and culture, just to name a few. In this regard, a number of legal instruments (treaties, protocols, declarations, regulations, guidelines, and memorandum of understanding) have been concluded to facilitate the process of regional integration.⁵⁸¹ For the purpose of this thesis, these instruments will be called “SADC community laws”. It should be made clear that the SADC treaty does not make provision for the relationship between the SADC community laws and national law of member states. This implies that the community laws do not have a binding or direct effect on the member states.

It is also significant to note that Article 21(3) does not include the harmonisation of commercial laws in the SADC, but that efforts are underway towards the harmonisation of commercial laws in the region.⁵⁸² This is an indication that the governments have

⁵⁷⁸ Ndulo “The need for the harmonisation of trade laws in the SADC” 1997 *African Yearbook of International Law (Afri. Y.B. Int'l L)* 201-204.

⁵⁷⁹ Art 21 (2) SADC treaty.

⁵⁸⁰ Ibid, art 22 (1).

⁵⁸¹ Cistac “Contribution to the development of a strategy for the harmonisation of economic and business law in SADC” 10-12 (2010, unpublished and on file with author) (hereinafter referred to as Cistac).

⁵⁸² Several international conferences and seminars have been organised to this effect. The first international conference convened in Maputo, Mozambique was premised on “regional integration

recognised the need for a commercial law structure in the region and in this respect; mention is made of the harmonisation of labour law.⁵⁸³ The SADC has adopted instruments relevant to the content of national labour laws. A key development has been the Charter of Fundamental Social Rights of Workers,⁵⁸⁴ which provides direction to member states to deal with issues pertaining to paid maternity leave and occupational health and safety protection, to name a few, but it is not a legally binding instrument.⁵⁸⁵ By the same token, the Council of Ministers (COM) has also established the SADC Employment and Labour Sector⁵⁸⁶ which is now an integral part of the Directorate of Social and Human Development and Special Programmes mandated to “improve labour productivity and social development”.⁵⁸⁷

To date, little progress seems to have been made towards the harmonisation of labour laws with no effort towards the harmonisation of the insolvency and company laws of the SADC member states.

4.2 The institutional structure of the SADC

The subject matter of this section is the SADC’s structure and the potential role of the institutions in the realisation of the aims and objectives of the SADC. The SADC consists of a variety of institutions and bodies, variously called institutions, organs, structures, and committees. While some of these bodies are established by treaty, others are by a decision of another body⁵⁸⁸ or member states.⁵⁸⁹ This segment focuses primarily on the SADC institutional structure, as described in Article 9 of the SADC

issues and SADC law” available at: <http://vi.unctad.org/files/mpzambique/uemsadceppt.doc>; accessed 12 July 2011. The second conference was premised on “mainstreaming regional integration through the second conference was premised on “mainstreaming regional integration through the harmonisation and modernisation of economic and business laws in southern Africa” available at: <http://www.ohada.com/fichiers/newsletters/1039/program.pdf>; accessed 12 July 2011.

⁵⁸³ Fenwick et al *Labour Law: A Southern African perspective*, Discussion Paper Series (2007) 8.

⁵⁸⁴ 23 August 2003 available at <http://www.sadc.int>; accessed 10 March 2012.

⁵⁸⁵ Fenwick et al (2007) at 8 (hereinafter referred to as Fenwick et al).

⁵⁸⁶ In February 2006, SADC Labour Ministers met in Zimbabwe to review the sector.

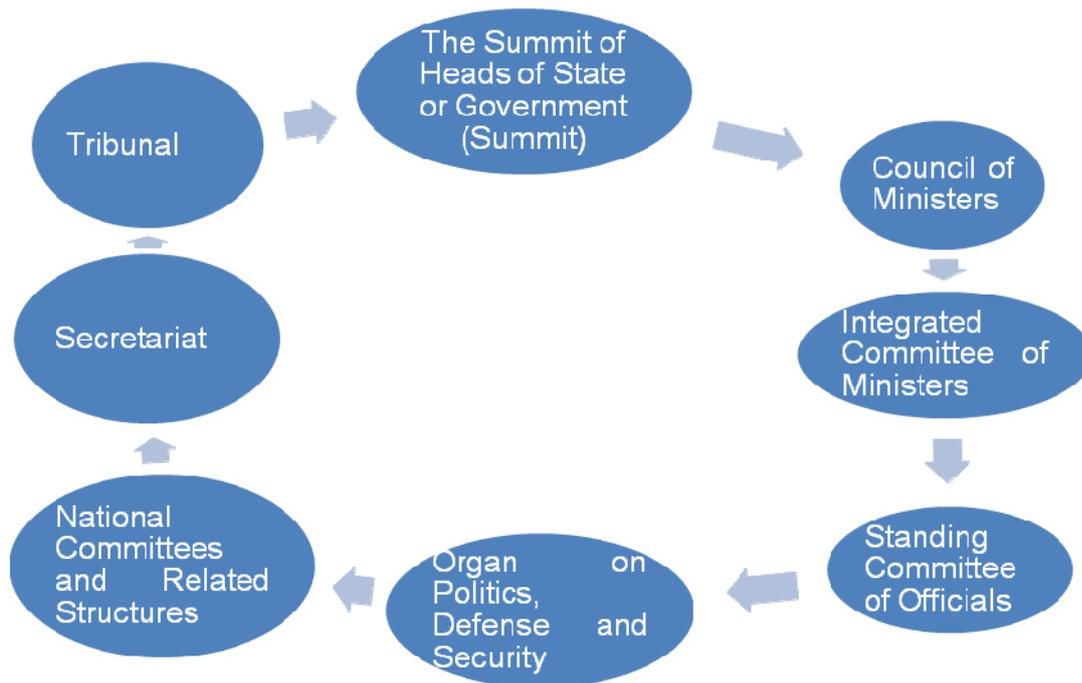
⁵⁸⁷ Fenwick et al (n 585) above.

⁵⁸⁸ The SADC Parliamentary Forum is created by a decision of the Summit.

⁵⁸⁹ Member states are expected to create each a national committee, which serves as a point of contact between SADC and its member states.

treaty.⁵⁹⁰ This is not to downplay the importance of other SADC institutions that contribute to the SADC's integration. The organisational structure is shown in the organogram below.

Figure 4.1: The SADC organisational structure



4.2.1 *The Summit of Heads of State or Government (Summit)*

The Summit comprises Heads of State or Government of the Southern African states and is chaired and co-chaired by a chairperson and deputy chairperson elected from among its members for one year, on a rotating basis.⁵⁹¹ The chairperson chairs Summit meetings which are held twice a year and tables matters for discussions. Moreover, the chairperson informs the Summit of the withdrawal of a member from the SADC.⁵⁹² As

⁵⁹⁰ The Summit of Heads of State or Government (Summit), the Organ on Politics and Security (OPDS), the Council of Ministers (COM), the Integrated Committee of Ministers (ICM), the Standing Committee of Officials (SCO), the Secretariat, the National Committees and the Tribunal.

⁵⁹¹ Art 10(1) SADC treaty.

⁵⁹² Ibid, art 34 (1).

the supreme-decision making body,⁵⁹³ it takes decisions by consensus, subject to certain exceptions.⁵⁹⁴ The amendment of the SADC Treaties and dissolution of the SADC and its institutions requires a decision of three quarters of the Summit members. A unanimous decision is required for the admission of a new member, and the imposition of sanctions⁵⁹⁵ against any member state who fails to comply with the decisions of the Tribunal and, to fulfill its obligations under the SADC treaty,⁵⁹⁶ implements policies which undermine the SADC's objectives and principles or states who are in arrears with their membership contributions without any good reason.⁵⁹⁷ The Summit is also empowered to dissolve the SADC, any of its institutions and, where necessary, to create other institutions. A unique example is the creation of the SADC Parliamentary Forum (SADCPF).⁵⁹⁸

The Summit gives overall policy direction, controls the organisation, and appoints the chairperson and deputy chairperson of the Organ on Politics, Defense and Security (OPDS) as well as the executive secretary and deputy executive secretary on the recommendation of the Council.⁵⁹⁹ In addition, the Summit may adopt the necessary legal instruments necessary for the implementation of the provisions of the SADC treaty.⁶⁰⁰ It may also approve and adopt treaties which are open for signature and ratification by the member states on the recommendation of the COM.⁶⁰¹ This refers primarily to treaties which may be necessary in the areas of co-operation as listed in Article 21 of the SADC treaty.⁶⁰² It would appear that the Summit will not approve or adopt any treaty concluded for the harmonisation of the commercial laws of the member states, on the basis that it is not included in the areas of co-operation since the SADC

⁵⁹³ Ibid, art 10 (1).

⁵⁹⁴ Ibid, art 10 (9).

⁵⁹⁵ Ibid, art 33.

⁵⁹⁶ Ibid, art 6. In 2004, DRC was suspended for failing to pay its dues.

⁵⁹⁷ Ibid, art 26.

⁵⁹⁸ It was formed in 1996 for the observation of elections in the region. In March 2005, it was invited to observe elections in Zimbabwe.

⁵⁹⁹ Art 10 (7) SADC treaty.

⁶⁰⁰ Ibid, art 10 (3).

⁶⁰¹ Ibid, art 22 (2).

⁶⁰² Ibid, art 21.

treaty gives the COM the opportunity to decide on additional areas of co-operation.⁶⁰³ It is submitted that the COM should include the harmonisation of commercial laws as one of the areas of co-operation⁶⁰⁴ for economic operators and certainty in the applicable law.

4.2.2 The Council of Ministers (COM)

As the name indicates, the COM consists of ministers of foreign and external affairs of all the member states. It is chaired and co-chaired by a chairperson and deputy chairperson appointed by the Summit's chairperson and deputy chairperson. The arrangement is said to reflect the SADC's current socio-economic, political and security co-operation. It works in close collaboration with the Summit and advises the Summit on policy issues which may be economic, social, or political, and issues about the functioning of the organisation. It oversees the functioning, development, and implementation of the SADC policies and the execution of its programmes.⁶⁰⁵ Furthermore, it co-ordinates and supervises the various institutions subordinated to it.⁶⁰⁶ In this respect, it appoints external auditors and designates five of the appointed judges as regular judges of the tribunal. More so, it determines the conditions of service for staff such as the judges, registrar, and other staff.⁶⁰⁷

4.2.3 The Integrated Committee of Ministers (ICM)

One may be tempted to say that the ICM is modeled on the EU's Council of Ministers, but the ICM consists of only two ministers from each of the member states⁶⁰⁸ without specification of the portfolios of the ministers, as is the case with the EU Council of Ministers.⁶⁰⁹ The ministers meet once a year to oversee the activities of technical directorates at the Secretariat, to monitor the implementation of the SADC's RISDP⁶¹⁰

⁶⁰³ Ibid, art 21(4).

⁶⁰⁴ See 'The SADC regional relations and cooperation post-apartheid' A micro framework study report (1993) 42.

⁶⁰⁵ Art 11(2) (a) (b) SADC treaty.

⁶⁰⁶ Ibid, art 11(2) (e).

⁶⁰⁷ Ibid, art 11(2) (i).

⁶⁰⁸ Ibid, art 12.

⁶⁰⁹ Under the EU, the Council of Ministers seating depends on the agenda for the day. If the matter on the Agenda is finance, it means therefore that only Finance ministers will meet.

⁶¹⁰ The RISDP is SADC's main socio-economic development plan approved in 2003. It identifies the

and to provide policy guidance to the Secretariat on core areas of co-operation.⁶¹¹ The ministers have general knowledge about the socio-economic, political, and security matters of their country, but they do not have a proper understanding of areas beyond their domain. It would thus be contra-productive to appoint a minister in charge of finance to oversee or provide policy guidance on agricultural matters.

Due to the ICM's inability to deliver as a result of its wide range of representatives,⁶¹² some of the former sectoral committees were re-established in some key areas, for example, energy and trade.⁶¹³ One of the strongest arguments that may emerge against the establishment of these committees is that there will be confusion, poor communication among the different sectors, and duplication. This calls for a redress on the current composition of the ICM and, seemingly, the dismantling of the ICM is the most appropriate alternative. This would avoid duplication of the structures and efforts and to enable the SADC to focus its resources on key objectives. If the ICM is dismantled, its functions should be performed by the COM.

4.2.4 The Standing Committee of Officials (SCOs)

The SCO meets four times a year and consists of one permanent secretary, or official of equivalent rank from each member state.⁶¹⁴ It is a technical advisory committee of the COM responsible for advising the COM and the processing of documents from the ICM to the COM.⁶¹⁵ The representatives of the SCO report to the COM. At a meeting convened in Maseru, Lesotho,⁶¹⁶ the SCO was directed to reprioritise SADC programmes and projects, and at a COM meeting, the findings of the senior officials

challenges in the areas of socio-economic cooperation. It also sets out and prioritised the goals, policies and strategies for the realisation of SADC's objectives.

⁶¹¹ Art 12 (2) SADC treaty.

⁶¹² Giuffrida and Muller-Glodde "Strengthening SADC institutional structures - capacity development is the key to the SADC secretariat's effectiveness" 2008 *Southern African Yearbook* 6-7.

⁶¹³ See the Extra-ordinary meeting of November 2007 in Lusaka, Zambia during which the Council decided in favour of the creation of Ministerial clusters to replace the ICM.

⁶¹⁴ Art 13 (1) SADC treaty.

⁶¹⁵ Ibid, art 13 (2) (3).

⁶¹⁶ SADC COM meeting of March 2007.

were approved. The idea was to “avoid limited resources being thinly spread over too large a number of different projects and programmes”.⁶¹⁷

4.2.5 The Organ on Politics, Defense and Security (OPDS)

Recently the developing world has witnessed the emergence of regional approaches to security problems. According to Hwang,⁶¹⁸ the regional approaches to security problems in Southeast Asia (ASEAN) and the SADC regions appear “to go beyond the example of Europe”. This is based on the fact that they adopt forms which are different from the integrationist model of the EU.⁶¹⁹ In this context, Held *et al* argued that:

Indeed, to date the rest of the world has largely rejected the EU model as something to emulate directly. Unlike the Westphalian principle of sovereign statehood, the Brussels principle of ‘pooled sovereignty’ has found little resonance in Kuala Lumpur, Brasilia or Lagos. Instead, beyond Europe, a more open form of regionalism has developed, referred to by the notion of the ‘new regionalism’.⁶²⁰

The approach to security problems is no surprise for a region like the SADC which is associated with internal and external conflicts. Schoeman lists a number of the SADC countries that are experiencing severe tensions and that are expected to fall prey to societal tensions and violence.⁶²¹ Nontobeko⁶²² attributes the social and political turmoil of the region to poverty and disease, pervasive underemployment, resources scarcities, and apartheid liberation struggles. In fact, one of the core principles of the SADC is the respect and protection of human rights, democracy, and the rule of law.⁶²³ This is premised on the belief that development and stability are intertwined; without stability, development will not take place. This is based on the fact that resources that could be spent on human development will go into wars, making the prospect of peace, security,

⁶¹⁷ SADC COM meeting of August 2007 convened in Lusaka, Zambia.

⁶¹⁸ Hwang *The mechanisms of politico-security regionalism in Southeast Asia and Southern Africa: A comparative case study of ASEAN and SADC* (LLD –Thesis University of Pretoria 2005) 1.

⁶¹⁹ Ibid.

⁶²⁰ Held *et al Global transformations: Politics, economics and culture* (1999) 76.

⁶²¹ Schoeman “Regional security in Africa: Can the SADC organ on politics, defense and security deliver peace in Southern Africa?” 2002 *DPMN Bulletin* 1.

⁶²² Nontobeko 2002 <http://ccs.ukzn.ac.za/default.asp?3.28.11.460> at 1 (hereinafter referred to as Nontobeko).

⁶²³ Art 4(c) SADC treaty.

and development a fading dream.⁶²⁴ In this regard, the OPDS was created in an effort to maintain peace and security, and manage conflict in the region. The OPDS functions in accordance with the SADC treaty and the OPDS Protocol.⁶²⁵

Given that the OPDS forms part of the AU architecture, it collaborates with the AU Peace and Security Council. Unfortunately, the OPDS has not been effective in preventing or ending conflicts in the region. This has been due to a number of obstacles that stand in its way:⁶²⁶

- lack of political will on the part of the member states, or a strong leader, and committed states through which security can be created and maintained; and
- differences of opinion between the two main powers in the region: South Africa and Zimbabwe, and their respective supporter states.⁶²⁷

With these problems, it would be inappropriate to expect the OPDS to bring peace, security, and prosperity to the region. There is a need for a better approach that advocates for more powers to the OPDS, commitment on the part of the member states, and for a majority decision-making process.

4.2.6 The SADC's National Committees and related National Structure (SNCs)

The SNCs were established in 2001 by the amended SADC treaty as an integral part of the SADC structures. In the words of the 2003 guidelines, “the creation of SNCs is to ensure that [member states] effectively participate in SADC affairs so as to derive maximum benefits from the process of regional integration”. The interaction between the SADC and its member states promotes wide acceptance of its ideas and policies, and human security.⁶²⁸ In terms of the treaty, it is the responsibility of each member state to

⁶²⁴ Schoeman 2002 *DPMN Bulletin* 5 (hereinafter referred to as Schoeman).

⁶²⁵ It was adopted on the 14 August 2001 and entered into force on the 2 March 2004 (hereinafter referred to as OPDS Protocol).

⁶²⁶ Schoeman (n 624) above.

⁶²⁷ South Africa with the support of Mozambique, Tanzania, Botswana and Zambia is regarded as “the peacemaking bloc” while Zimbabwe and its allies, particularly Angola and Namibia are regarded as “the defense treaty Bloc”; Schoeman (n 624) above.

⁶²⁸ Balule “The legal environment of SADC civil society interactions in pursuance of human security” 2

create an SNC consisting of key stakeholders: the private sector, government, civil society, non-governmental organisations, workers' and employers' organisations,⁶²⁹ and national secretariats; all of which must reflect the four areas of co-operation. The SNCs are the focal points between the SADC and its member states with the following responsibilities: to promote and broaden stakeholders participation in SADC's affairs in order to facilitate the flow of information and communication between member states and the SADC, and to co-ordinate and oversee the implementation of the SADC's programme, and RISDP at the national level.⁶³⁰

The National Secretariats submit reports to the SADC Secretariat. It is not clear whether the national secretariats and the SNCs are one body, or distinct from one another and this is confusing. An examination of the functions of SNCs, the National Secretariats and Article 16 (a) (9) of the treaty, reveals that they are not one body. Article 16 (a) (9) of the treaty provides: "each member state shall create a national secretariat to facilitate the operation of the SNC". As the SADC Secretariat is to the organisation, so are the national secretariats to the National Committees. The lack of experienced staff and, more specifically, lack of finance, are the major problems behind the creation of SNCs and national secretariats in the member states.

4.2.7 The Secretariat

The Secretariat is the principal executive and administrative body⁶³¹ that provides administrative support to SADC bodies, and ensures the implementation of the decisions of the various bodies.⁶³² Specifically, the Secretariat is responsible for organising SADC meetings and those of the various institutions, as well as preparation of the agenda and records of the meetings of the various bodies. It is also responsible for co-ordinating, monitoring, and implementation of the decisions of the Summit and the COM. In addition, it disseminates SADC information, prepares administrative

(hereinafter referred to as Balule).

⁶²⁹ Arts 16 (a) (2) and (13) SADC treaty. The SNCs are not functional in most of the member states. At present, they are only functional in four member states, exist on paper in seven member states and non-existing in three member states; see (n 27) above.

⁶³⁰ Ibid, art 16 (4).

⁶³¹ Art 14(1).

⁶³² Ibid.

regulations, standing orders, and management rules for approval by the COM.⁶³³ The Secretariat is a permanent institution located in Gaborone, Botswana, and is headed by an executive secretary, deputy executive secretary,⁶³⁴ and a chief director. Both the executive and the deputy executive secretary are appointed on the recommendation of the COM for one renewable term of four years. The executive secretary in turns appoints the secretariat staff in accordance with procedures, terms and conditions defined by the COM.

The Secretariat faces a number of challenges in the discharge of its functions. From the three institutional assessments⁶³⁵ undertaken by Klynveld Peat Marwick Goerdeler (KPMG),⁶³⁶ the European Commission through Ernest & Young,⁶³⁷ and the German Government through Gesellschaft für Technische Zusammenarbeit (GTZ),⁶³⁸ they found that:⁶³⁹

- the division of labour and reporting lines and responsibilities between the Deputy Executive Secretary and Chief Director were not clear, nor were they consistent with the treaty provisions, which according to them prevents co-ordinated decision-making at the top management level;
- they uncovered some weaknesses in the financial management system, and suggested the application of international best practices to improve accountability and management;
- they uncovered unbalanced representation in the secretariat of all countries, and recommended a quota system to ensure balance;
- shortage of staff, which makes it difficult for the secretariat to discharge its function effectively; and

⁶³³ Ibid.

⁶³⁴ Ibid.

⁶³⁵ The assessments were undertaken between the year 2006 and 2007.

⁶³⁶ KPMG focused on aligning Secretariat organisational structure, grading system, and remuneration structure and performance management and appraisal system.

⁶³⁷ Ernest & Young focused on improving SADC Secretariat operating policies and procedures.

⁶³⁸ They focused on strengthening staff competence, organisational structure cohesion and capacities.

⁶³⁹ Giuffrida and Muller-Glodde 2008 *Southern African Yearbook* (n 611) 7-12 (hereinafter referred to as Giuffrida and Muller-Glodde).

- lack of resources to cover too many projects.

In the roadmap for implementing institutional change, a number of core intervention areas were identified; some of which were: the reprioritisation of the SADC agenda, strengthening of the Secretariat and national governance and management structures, and the alignment of the Secretariat's functions to the integration agenda; and to date, these changes have been made.⁶⁴⁰ Firstly, the Secretariat's staff has developed a directorate-based five-year Strategic Plan, budgets, and a more detailed Annual Business Plan and Budget for use by key SADC stakeholders to measure progress. Furthermore, ongoing interventions have led to the development of the Secretariat's performance management policy. These are strong moves towards institutionalising the planning and monitoring functions of the Secretariat.⁶⁴¹

4.2.8 The Tribunal

4.2.8.1 The Tribunal and its scope of jurisdiction

The Tribunal, which is based in Windhoek, Namibia, was established in 1992 by Article 9 of the SADC treaty as one of the institutions of the SADC. The Tribunal is one of the youngest regional courts in Africa created to “ensure adherence to and proper interpretation of the provisions of the treaty and subsidiary instruments and to adjudicate upon disputes as may be referred to it”.⁶⁴² In the words of Article 16 (1) of the SADC treaty, “The Tribunal shall be constituted to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it”. This refers to disputes between states, and between natural or legal persons and states regarding SADC community laws. Although the Tribunal is not a human rights court or criminal court per se, it has jurisdiction to hear human rights matters and to review the conduct of member states in how they deal with criminal cases.⁶⁴³ It is also mandated to give “advisory opinions on

⁶⁴⁰ Ibid, 13-17.

⁶⁴¹ Ibid.

⁶⁴² Art 16 SADC treaty.

⁶⁴³ The SADC Tribunal in 20 questions: A guide to SADCT available at: <http://www.sadc-tribunal.org/docs/A-Guide-to-SADC-T.Pdf>; accessed 14 November 2011.

such matters as the Summit or the COM may refer to it”.⁶⁴⁴ This was intended to help the Tribunal develop community jurisprudence in accordance with relevant rules of law.

Article 21(b) of the Tribunal Protocol provides: “the Tribunal shall develop its own community jurisprudence having regard to applicable treaties, general principles and rules of public international law and any rules and principles of the law of states”, but it has in several cases missed this opportunity. The Tribunal had its first opportunity to hear a case between a staff member and the Community in *Ernest Francis Mtingwi v SADC Secretariat*,⁶⁴⁵ which involved a labour dispute between Ernest, a Malawian national, and the Secretariat. Ernest was offered employment but before he could take duty, the offer was revoked on the basis that he had failed to report at his duty station.⁶⁴⁶ Ernest took the matter on appeal to the Tribunal. Before the Tribunal, he sought for an order declaring the cancellation of his offer of employment as unlawful. In response, the Tribunal concluded that there was no binding contract of employment between the parties because the reciprocal obligations necessary for an effective contract of employment were absent and thus the applicant was not yet an employee.⁶⁴⁷

It is clear that in coming to its conclusion the Tribunal did not have regard to applicable treaties, general principles and rules of public international law and position in any member state. In so doing, it missed the opportunity to develop community jurisprudence. It is submitted that the Tribunal’s decision would have been different if it had considered judgments of the International Labour Organisation (ILO)’s International Administrative Tribunal (IAT) judgment 307,⁶⁴⁸ or the position as it appears in any of the

⁶⁴⁴ Art 16(4) SADC treaty.

⁶⁴⁵ SADC (T) 2 2007. See *Kanyama v SADC Secretariat* (SADC (T) 05/2009 [2010] SADCT 1 (29 January 2010) and *Mondlane v SADC Secretariat* (SADC (T) 07/2009 [2010] SADCT 3 (5 February 2010)). In these cases, the COM and the Summit decided not to renew the contracts of Mondlane and Kanyama without valid reasons. In response Mondlane and Kanyama took the matter to the Tribunal. The Tribunal decided in their favour on their grounds that they had a legitimate and reasonable expectation that their contracts would be renewed and that the COM and Summit took into account irrelevant and wrongful considerations in coming to their decisions.

⁶⁴⁶ “The Tribunal’s ground-breaking” 2010 *SADC Review* 13.

⁶⁴⁷ The decision was in accordance with rule 14.2.6 of the SADC Administration Rules and Procedures Handbook.

⁶⁴⁸ *In Re Labarthe* International Labour Organisation Administrative Tribunal Judgment 307/1997.

member states. In judgment 307, the IAT held that: “there is a binding contract if there is an intention on both sides to the contract and if all the essential terms have been settled and if all that remains to be done is a formality which requires no further agreement”.⁶⁴⁹ It follows from the judgment that “intention” is a prerequisite for an effective contract of employment. Though it is difficult to ascertain the intention of the parties, the offer of employment backed by acceptance is indicative of the intention of the parties. In view of the above, one may say that the applicant was an employee, and that his failure to report to the duty station was a mere formality which requires no further agreement.

The Tribunal also had an opportunity to hear a case between a member state and a natural person. In the case between *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe*,⁶⁵⁰ the government of Zimbabwe expropriated a number of white-owned agricultural lands. This followed an amendment to the Constitution of the country.⁶⁵¹ Mike Campbell (Pvt) Ltd and William Michael Campbell, whose lands were expropriated, filed an application with SADC Tribunal challenging the appropriation by the State of their lands.⁶⁵² The applicants contended that the land acquisition process was racist and was in contravention of Article 6 of the SADC treaty that outlaws arbitrary and racially motivated government action.⁶⁵³ The Tribunal concluded that the Republic of Zimbabwe was in breach of its obligations under Articles 4(c) and 6(2) of the SADC treaty. The Tribunal also decided that section 16B of the Constitution of Zimbabwe was unlawful because it denied claimants the right of access to the court and the right to a fair hearing, which are tenets essential of the rule of law.⁶⁵⁴

⁶⁴⁹ Ibid.

⁶⁵⁰ Supra (n 38) above.

⁶⁵¹ S16B (2) Amendment Act 17 of 2005. S16 (b) reads in relevant parts as follows: “all agricultural land... acquired by and vested in the state with full title therein...; and no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected in such land before it was acquired”; see Zongwa “The contribution of Campbell v Zimbabwe to foreign investment law on expropriations” 2010 *Namibia Law Journal* 29-51.

⁶⁵² 11 October 2007.

⁶⁵³ Art 6 provides that: “SADC and its member states shall not discriminate against any person on grounds of gender, race, and political views. Religion, ethnic origin, culture or disability”, while Article 4 provides that SADC and its member states shall act in accordance with the principles of democracy, human rights and rule of law as well as equity, balance and mutual benefits; and the peaceful settlement of disputes, inter alia. Apart from these, it is also the duty of the member states to provide effective remedies to parties to a dispute.

⁶⁵⁴ Pillay 2013 <http://www.safpi.org/publications/reflecting-sadc-tribunal-missed-opportunity> at 2.

4.2.8.2 *Judgment and its enforcement*

The decisions of the Tribunal are taken by a majority vote, and in terms of Article 24(3) of the Tribunal Protocol, they shall be “final and binding” on the parties to the dispute. This is to say that the decisions like those of the Summit⁶⁵⁵ are not subject to further appeal. This is important for various reasons. Firstly, it prevents unnecessary delays, on the basis that an issue cannot be tried in another court. Secondly, it keeps a legal system leaner and more efficient by allowing judges to turn down cases which have already been tried and judged. Although no appeal is allowed, the Tribunal Rules of Procedure make provision for a review and rectification of the decisions of the Tribunal. The Tribunal may, on its own motion or on application by a party, review a decision if decisive new facts become available which by their nature might have had a decisive influence on the decision of the Tribunal had it been known at the time that the decision was given.⁶⁵⁶

In response to the Tribunal’s decision, the government of Zimbabwe argued that the applicants had not exhausted local remedies and consequently refused to comply with the decisions of the Tribunal. Not only did the government of Zimbabwe fail to comply with the decisions of the Tribunal, but it made it clear that decisions of the Tribunal against Zimbabwe shall be null and void.⁶⁵⁷ As President Mugabe puts it, “the judgments were ‘nonsense’ and ‘of no consequences’”. Land issues would be Zimbabwean affairs, not SADC affairs”.⁶⁵⁸ The government of Zimbabwe has consistently resisted the enforcement of the Tribunal judgments on two distinct grounds: firstly, on the grounds that it had never ratified the Protocol to the SADC treaty creating the SADC Tribunal and, as such it could not be recognised as an institution. Secondly, the government argued that adhering to the Tribunal’s verdict would be contrary to public policy. In *Garama (private) Limited and others v Government of Zimbabwe and*

⁶⁵⁵ Art 10 (9) SADC treaty.

⁶⁵⁶ Rule 71 Tribunal Rules of Procedure 1992.

⁶⁵⁷ May “Legal Opinion: Zimbabwe withdraws from SADC Tribunal” *Time Live Newspaper* 14 September 2009 at 1 (hereinafter referred to as May).

⁶⁵⁸ See (<http://bit.ly/u4Lss7>; accessed 12 September 2011).

others,⁶⁵⁹ the government practically refused to enforce the judgment of the Tribunal on the grounds that it would be “fundamentally contrary to public policy of [the] country”.⁶⁶⁰ This case illustrates Zimbabwe’s reluctance to surrender any of its sovereignty⁶⁶¹ to the Tribunal.⁶⁶² It also highlights the weakness of the Tribunal and the Summit in the application and implementation of ratified SADC treaties. The weakness of these bodies constitutes a starting point for reform.

The white farmers decided to take the matter to the North Gauteng High Court following Zimbabwe’s refusal to compensate them for loss of their land, as ordered by the Tribunal. The Court ruled in their favour and ordered the attachment and auction of the government of Zimbabwe’s property to defray the farmers’ claims.⁶⁶³ The government of Zimbabwe took the matter on appeal to the Supreme Court of Appeal (SCA), which dismissed the appeal. The Constitutional Court equally dismissed the appeal on the grounds of Article 32 of the SADC Treaty, which obliges member states to facilitate the enforcement of judgments and orders of the Tribunal. This decision is considered an important victory for the farmers.⁶⁶⁴

Article 32(4) of the Tribunal Protocol further provides that in the event of non-compliance with a decision of the Tribunal, it must be referred by any party concerned to the Tribunal who in terms of Article 32 (5) of the Protocol must refer the matter to the Summit for appropriate action. Unfortunately, Article 33 does not provide for any sanction that may be imposed against a state which fails to comply with its obligation. The lack of sanctions against defaulting states⁶⁶⁵ makes it possible for states to escape their international obligations.⁶⁶⁶ An executed judgment promotes unity, peace, and

⁶⁵⁹ Case 24/11/2009 judgment 26/01/2010.

⁶⁶⁰ Ibid.

⁶⁶¹ The conferral by states of their sovereign powers is increasingly being contested because of it impinges on the exercise of government powers; Sutherland *et al* 2005 http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.htm at 29.

⁶⁶² Scholtz “Review of the role, functions and terms of reference of the SADC Tribunal” 2011 *SADC Law Journal* 197.

⁶⁶³ Bell 2013 <http://www.allafrica.com/stories/201306280265.html> at 1.

⁶⁶⁴ Ibid.

⁶⁶⁵ Zoleka 2009 <http://www.growth.co.za.index/php/about-growth-magazine/1-latest-news/6-will-sadc> at 1 (hereinafter referred to as Zoleka)

⁶⁶⁶ Coleman and Erasmus 2008 http://www.tralac.org/unique/tralac/pdf/2008205_hotseat.pdf at 2-4 (hereinafter referred to as Coleman and Erasmus).

order among states. Due to the importance of enforcement, it is required that the Summit provide for appropriate sanctions.

It is to be noted at this stage that apart from the Constitutional Court's decision mentioned above, no action was taken against Zimbabwe for non-enforcement of the Mike Campbell Judgment. Instead, the Summit ordered a suspension and review of the Tribunal's role, functions, and terms of reference⁶⁶⁷ which according to Nicole Fritz,⁶⁶⁷ "... is a fatal blow to the rule of law in the region and to the obedience of member states to any supranational SADC values, institutions and decisions".⁶⁶⁸ The World Trade Institute Advisors (WTIA) was commissioned to do the review. After the company's study of the Tribunal, it came up with the following propositions:

- SADC member states should ensure that they give the force of law to SADC law by amending national law;
- that member states should consider amending the SADC treaty to state that SADC law is supreme over national law; including constitutional law;
- the Tribunal Protocol should be amended to provide that membership and rights of member states may be suspended, with the Summit taking account of the possible consequences; and
- the Tribunal should be able to order remedies (including fines) for non-compliance.⁶⁶⁹

It is unfortunate that these propositions have not yet been implemented. This in itself might partly be a consequence of the recommendations not being what SADC leaders had hoped for. Instead of accepting the WTIA's recommendations, the Ministers of Justice/ Attorneys Generals were tasked by the SADC leaders to negotiate a new protocol on the Tribunal, the mandate of which will be confined to the interpretation of

⁶⁶⁷ Fabricius 'SADC deals blow to the rule of law' *Pretoria News* 23 May 2011 at 9.

⁶⁶⁸ PANA 'SALC accuses the SADC leaders of sabotaging SADC Tribunal' *African News* 23 May 2011 at 1.

⁶⁶⁹ See undocumented information disseminated on the internet; Ziegler, *Regional economic integration agreements and investor protection in Africa – The case of SADC: Why institutional overlap may be necessary in certain cases*, Working Paper (2011) 12. See also Wafawarova 'Windhoek: A victory for justice' the *Herald Online* 8 June 2011 and Bell 'SADC Tribunal review upholds land grab judgment' the *Independent Voice of Zimbabwe* 12 April 2011 at 1.

the SADC treaty and protocols relating to disputes between the member states.⁶⁷⁰ The Southern African Legislation Centre (SALC) called the Summit's decision as "shocking", saying it "not only left the Tribunal in limbo but also rendered it completely toothless by denying individual access to court".⁶⁷¹ Only inter-state disputes will be heard by the proposed Tribunal. This means that individual and juristic person's right of standing will be abolished. It equally means that trade disputes will not be considered.⁶⁷² The retrogressive decision taken by the Summit in reducing the Tribunal's jurisdiction is an indication that the SADC leaders are not inclined to creating an institution that will preside over all disputes arising from within the community. This, amongst other things not only undermined the advancement of human rights and the rule of law but will also handicap the effectiveness of the proposed Tribunal and hence the realisation of the SADC's objectives and integration targets. The new Tribunal structure is more troublesome than the previous one. Not only does it deny SADC citizens access of justice but also to seek effectively legal remedies.

4.3 A comparison of the SADC and OHADA

The SADC approach can be contrasted with that of OHADA. As indicated above, the SADC and OHADA are both international organisations.⁶⁷³ An important element or feature of international organisations is the conferring of sovereign power by member states. Sarooshi⁶⁷⁴ distinguishes between the transfer of power and the delegation of power on the basis that the transfer of power is irrevocable, and the delegation of power is revocable. This distinction is important here because it enables us to know the extent to which the SADC and OHADA member states have ceded their powers. However, because of the regard leaders, especially African leaders, have for power, it cannot be denied that African states will transfer their powers only in respect of certain matters.⁶⁷⁵

⁶⁷⁰ SADC summit 17-18 August 2013. The decision to negotiate a new protocol is following the final communiqué from the 32nd summit.

⁶⁷¹ Rabin 'SALC in the news: New Sadc Tribunal will bar individuals' *Business Day* 12 August 2012 at 1.

⁶⁷² Makonese "The Sadc tribunal conundrum – lawyers took to the African court for direction" 2013 *De Rebus* 1. Erasmus 2013 <http://www.tralac.org/files/2013/08/tralac-Policy-Brief-Progress-report-on-SADC-Tribunal-20130828.pdf> at 1 (hereinafter referred to as Erasmus).

⁶⁷³ Art 3 SADC treaty and art 46 OHADA treaty. Weiller described international organisations as "a platform for interaction between and among various states"; Weiller (1999) 273.

⁶⁷⁴ Sarooshi *International organisations and their exercise of sovereign powers* (2005) 66.

⁶⁷⁵ Ibid.

This represents nothing less than a challenge to a successful integration process. This example serves to underline the point that a conferral of powers to international organisations by African leaders is not always a “full conferral”.⁶⁷⁶ As Udombaba aptly described:

African leaders lack the certitude to face the challenges of integration. Integration requires that each constituent party has clearly defined national plans and strategies to achieve economic development. Like a child in a toyshop, most leaders in Africa do not know which way to look. They have been unable to make the changes that will sustain growth and development. Others are not prepared to subordinate immediate national plans to long term-economic regional goals or to cede essential elements of sovereignty to regional institutions.⁶⁷⁷

The transfer of power, or sovereignty, suggests that if a state transfers its powers in favour of an international organisation, such a state can no longer withdraw its powers. The implication is that the state remains bound by the obligations which flow from the organisation. Through a perusal of the OHADA treaty, there is no provision on the withdrawal of a member state. Instead, after ratification of the present treaty by any state, such a state is deemed to be a party to the treaty.⁶⁷⁸ This is an indication that OHADA member states have transferred their powers to OHADA. Consequently, member states are bound by the obligations which flow from the organisation, and cannot exercise direct control over the organisation in the exercise of their powers.⁶⁷⁹ OHADA possesses the decision-making and dispute-settlement powers in the region in matters related to the Uniform Acts. These two characteristics militate strongly in favour of full conferral being characterised as transfer, and not delegation. This finds support in Articles 10, 16 and 20 of the OHADA treaty.

Regarding the SADC, Article 34 of the SADC treaty provides “A member state wishing to withdraw from [the] SADC shall serve notice of its intention in writing, a year in

⁶⁷⁶ Ibid.

⁶⁷⁷ Udombana “A harmony or a cacophony? The music of integration in the African union treaty and the new partnership for Africa’s development” 2002 *Indianan International and Comparative Law Review* 202.

⁶⁷⁸ Art 58 OHADA treaty.

⁶⁷⁹ Sarooshi (2005) 65 (hereinafter referred to as Sarooshi).

advance, to the chairman of [the] SADC, who shall inform other member states accordingly”. Article 34 gives the SADC states the opportunity to escape their international responsibility. In consequence, the Republic of Zimbabwe has failed on several occasions to comply with the decisions of the Tribunal,⁶⁸⁰ on the grounds that the supreme law of the country which is the Constitution “has not made provision for the courts to be subject to the Tribunal”.⁶⁸¹ By implication, SADC member states have direct control over SADC institutions. This finds support in Article 6 (1) and (5) of the SADC treaty. Article 6 (1) provides that “member states undertake to adopt adequate measures to promote the achievement of the objectives of [the] SADC, and to refrain from taking any measure likely to jeopardise the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of the treaty”, while Article 6 (5) provides that “member states shall take all necessary steps to accord this treaty the force of national law”. This however does not mean that the SADC cannot evolve to a supranational status.⁶⁸²

Secondly, OHADA operates a uniform commercial legal system which subjects people transacting across national boundaries to the same substantive law.⁶⁸³ The SADC on the other hand does not operate a uniform commercial law system. The SADC adopts a framework of co-operation based on equity and mutual trust.⁶⁸⁴ Having said this, the question arises: Is there a need for a commercial law structure in the SADC? The author answers in the affirmative for a number of reasons, as discussed below.

⁶⁸⁰ *Mike Campbell (PVT) and another v Government of Zimbabwe supra* (n 37) above. See Memory and Midgley “Land reform in Zimbabwe: Context, process, legal and constitutional issues and Implications for the SADC region” 2008 *Monitoring Regional Integration in Southern Africa Yearbook* 1-40.

⁶⁸¹ *Richard Thomas Etheredge v The Minister of state for national Security responsible for lands, land reform and resettlement and Senator Edna Madzongwe* HC 3295/08 (unreported). See Ebobrah and Nkhata “Is the SADC Tribunal under judicial siege in Zimbabwe? Reflections on *Etheredge v The Minister of state for national security responsible for lands, land reform and resettlement and another*” 2010 *Comparative and International Law Journal of Southern Africa (CILSA)* 82-92.

⁶⁸² Haas *The unity of Europe: Political, social and economic forces 1950-1957* (1958) 59.

⁶⁸³ Oppong (n 23) above. See Hartnell “The new international economic order: Private international law” 1993 *American Society International Law Proceedings* 462.

⁶⁸⁴ Art 5 SADC treaty.

4.4 The need for a uniform commercial law approach in the SADC

First of all, uniform commercial legislation here refers to detailed and accessible uniform commercial rules that are directly applicable in the domestic jurisdictions of SADC states, without any need on the part of the member states to enact legislation for their implementation. The main dilemma of this section is to consider the justifications advanced for uniform commercial rules in the SADC.⁶⁸⁵ Even though a comprehensive theoretical discussion of the commercial laws of SADC states has a moral practical orientation, it is not examined here. Due to the paucity of reliable and uniform data, and studies on the commercial laws of SADC states, reference is made to SADC countries for which there are data and studies: there are good reasons for the SADC to adopt uniform commercial legislation. The justifications are to be found in the modernisation of the commercial laws, catering for the increase in cross-border transactions, the rise in human and corporate migrations, and cross-border insolvency disputes.

4.4.1 Modernisation of the commercial laws

The modernisation of laws is an argument in favour of such a reform. The application of old, established laws is out of sync with the economic realities of SADC states. Despite the law reforms and consequential legislative authority, most SADC states still suffer from outdated and incomplete legal systems which have long been abandoned in the countries from which they were adopted.⁶⁸⁶ The application of outdated insolvency statutes in South Africa, Namibia and Botswana courts is evident.⁶⁸⁷ One wonders how long these countries will continue to apply out-dated statutes. If there is any lesson that the leaders of SADC states may learn from other experiences, particularly from OHADA, is the fact that out-dated laws has negative effects because they are counter-productive, they are not responsive to contemporary demands, and they account for a slowdown in investment. To facilitate “commercial presence” and to meet the economic

⁶⁸⁵ McKendrick “Harmonisation of European contract law” in Vegenauer S and Weatherhill S *The harmonisation of European contract law implications for European private law, business and legal practice* (2006) 14.

⁶⁸⁶ South African Companies Act 61 of 1973 as amended by the Companies Act 71 of 2008 and the Insolvency Act (IA) 24 of 1936; Namibia IA 61 of 1936 and Companies Act 28 of 1994, and Botswana IA of 1929 Companies Act CAP 42: 01.

⁶⁸⁷ *Ibid.*

needs of investors and traders, there is the need for these states to modernise their commercial laws.⁶⁸⁸

4.4.2 To cater for the increase in cross-border transactions

The fact that trade is international in character puts it outside the jurisdiction of national laws. This is because national laws do not have the framework within which cross-border commercial transactions can be conducted or regulated, and as such it would be unthinkable to allow cross-border trade to be governed by a varying national laws.⁶⁸⁹ The application of national laws to cross-border transactions is what is happening in most parts of the world. Even though a national commercial law may offer appropriate solutions to cross-border problems, only a few states may feel comfortable to embrace the foreign commercial law.⁶⁹⁰ The inadequacy of national laws and the increase in cross-border trade provide an impetus for the development of a commercial law structure in the SADC. Although the catering for the increase in cross-border trade is not a requirement for the development of a commercial law structure, it may be argued that a uniform set of commercial rules is needed to provide for the rise in the region's human and corporate migrations.

4.4.3 To cater for the rise in human and corporate migrations in the SADC

Thanks to globalisation, the rise in the world human and corporate migrations is another predominant and prompting economic argument in favour of a uniform commercial law in the SADC. Research conducted by Olivier shows that the intra-SADC movement is more towards Botswana, Namibia, and South Africa because they have stronger economies,⁶⁹¹ and because they are more developed in terms of administrative and economic structures.⁶⁹² Although he does not indicate the number or percentage of

⁶⁸⁸ Steyn and Everingham *The new Companies Act unlocked* (2011) 16. Fortunately, the South African Companies Act has been modernised and its counterparts must follow suit.

⁶⁸⁹ See the UNIDROIT-Secretariat's Report on the "Progressive codification of the law of the international trade" available at <http://www.uncitral.org>; accessed 17 September 2011.

⁶⁹⁰ McCormack *Secured credit and the harmonisation of law: The UCITRAL experience* (2011) 29.

⁶⁹¹ Olivier "Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework" 2011 *SADC Law Journal* 123.

⁶⁹² Kabundi and Loots 2005 <http://www.tips.org.za/files/768.pdf> at 2. A five-country study on intra-SADC migration revealed that 86% of migrants from Botswana, Lesotho, Mozambique, Swaziland

migrants to and from each country in Southern Africa, there is no doubt that some of the interchange involved SADC countries directly.⁶⁹³ This is particularly true of movements involving farmers, entrepreneurs, traders, as well as job seekers in the community. A study conducted by the Southern African Migration Project showed that “of the 6,000,000 borders crossing in a year [into South Africa], 30-50% are by small-scale traders”.⁶⁹⁴ The trend has been even more spectacular for companies. Checkers, MTN, Standard Bank, and a host of other companies that have regional and worldwide branches, can attest to this phenomenon.

South Africa plays a critical role in the rest of SADC states in terms of foreign investment. Although it is difficult to obtain precise information on South Africa’s investment in the rest of Africa, a paper produced by LiquidAfrica Research reveals that “South Africa was the largest investor into the rest of Africa in the decade from 1990 to 2000 ... averaged around \$1.4 billion annually ...”⁶⁹⁵ The WhiteHouse & Associates paper also shows that “South Africa enjoys no less than 75% of the total market in each country [in the region]”.⁶⁹⁶

Intraregional differences in commercial laws have huge implications for workers and firms operating in the region. The difference in the intensity of labour regulation affects workers’ employment contracts, earnings, and generates differences in the price of labour.⁶⁹⁷ At present, employment contracts are heavily regulated in Angola, DRC, Zambia, Botswana, and Madagascar and least regulated in Lesotho, Malawi, Mauritius, and Swaziland.⁶⁹⁸ Undoubtedly, countries with the least regulated employment

And Zimbabwe are currently working in South Africa; see Pendleton *et al* (eds) “Migration, Remittances and Development in Southern Africa” 2006 *Migration Policy Series* 44.

⁶⁹³ Olivier 2011 *SADC Law Journal* 123 (hereinafter referred to as Olivier).

⁶⁹⁴ Ibid, 140. See Crush 2008 <http://www.migrationinformation.org/Profiles/display.cfm?ID=689> at 1.

⁶⁹⁵ LiquidAfrica “Johannesburg Stock Exchange (Companies in Africa” 2003).

⁶⁹⁶ WhiteHouse & Associates, *South Africa’s business presence in Africa, South Africa foundation occasional paper* (2004) 11.

⁶⁹⁷ See ‘The business environment in Southern Africa: Issues in trade and market integration’ 10 (http://www.sadc.int/files/3213/0097/0116/Executive_Summary_SADC_Regional_ICA-November.pdf; accessed 201 June 2012).

⁶⁹⁸ See ‘The business environment in Southern Africa: Issues in trade and market integration’ 10 (http://www.sadc.int/files/3213/0097/0116/Executive_Summary_SADC_Regional_ICA-November.pdf; accessed 201 June 2012).

contracts will attract more foreign direct investment (FDI). Firms operating across the region face high trade costs (transport and regulatory costs) particularly in Angola, DRC, Zambia, Botswana, Lesotho and Zimbabwe.⁶⁹⁹ From these statistics it is possible to see the need for a uniform law to facilitate free entry and the establishment of humans and corporations into and within the SADC community. There is no doubt that trade between people and nations will continue to increase, so it is necessary for the SADC to develop a commercial law structure that will facilitate free entry and establishment of humans and corporations, and cater for cross-border insolvency disputes.

4.4.4 To cater for cross-border insolvency disputes

First of all cross-border insolvency refers to a situation where the debtor has assets and debts, or both, in a number of jurisdictions. This situation has grown rapidly following the advent of globalisation which has rendered the world into a global village. When this happens in the SADC, the questions will be:

- which country's law is applicable to the control of the assets and debts of the debtor;
- in which country's courts will such a dispute be litigated; and
- with what ease will a judgment obtained in one country, be enforced in another?⁷⁰⁰

Hitherto, these questions have not been addressed in any attempt to unify the private international rules applicable to cross-border insolvency disputes in the SADC. This is not a very good picture for a region where the governments are avowedly committed to alleviating poverty and improving cross-border trade.⁷⁰¹ Consider a debtor in South Africa who has assets or debts in Namibia and Botswana against whom insolvency proceedings have been instituted in South Africa. Since these countries are not parties

⁶⁹⁹ Ibid, 13.

⁷⁰⁰ Mason "Cross-border insolvency law: Where private international law and insolvency law meet" in Omar J (ed) *International insolvency law. Themes and prospective* (2008) 39-40. See Nygh and Davies *Conflict of Laws in Australia* (2002) 6-7.

⁷⁰¹ See the preamble of the SADC treaty as amended in 2001.

to an international convention or treaty on cross-border insolvency,⁷⁰² it means therefore that the assets and debts of the debtor cannot be controlled in South Africa without the assistance of the courts, lawyers, and administrative staff of the other states, the applicable principles, or application of the conflict of law rules of the other states.⁷⁰³ On the relevance of conflict of laws, Lord Nicholls of Birkenhead explains that:

Conflict of laws jurisprudence is concerned essentially with the just disposal of proceedings having a foreign element. The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an issue brought before a court in one country may be more appropriately decided by reference to the laws of another country even though those laws are different from the law of the forum court.⁷⁰⁴

On his part, Prosser describes the realm of conflict of laws as “a dismal swamp, filled with quaking quagmire, and inhibited by learned but eccentric professors who theorised about mysterious matter in a strange and incomprehensible jargon”.⁷⁰⁵ For Mason,⁷⁰⁶ conflict of laws “ignores the challenges that globalisation presents to laws affecting a state’s participation in cross-border trade and commerce”. Conflict of laws is thus an impediment to cross-border commercial activity.⁷⁰⁷ Not only does it impair states and individuals from entering into cross-border transactions, but also their participation in cross-border transactions for fear of the unknown. Similarly, it impedes the achievement of the objectives of the economic integration schemes, and the economic development of states.⁷⁰⁸ It is prodigiously for these reasons that a call is made to the SADC to end the legal impasse of the different commercial laws in all its forms, and embrace a

⁷⁰² South Africa has in fact adopted a Cross-Border Insolvency Act 42 of 2000 which is not yet in force because the minister of justice has not yet designated the relevant countries to which it would apply.

⁷⁰³ McClean and Beevers *The conflict of laws* (2005) 2-3.

⁷⁰⁴ Ibid.

⁷⁰⁵ See Prosser “Interstate publication” *Michigan Law Review* 959 at 971.

⁷⁰⁶ Mason “Cross-border insolvency law: Where private international law and insolvency law meet” 41 (hereinafter referred to as Mason).

⁷⁰⁷ See Walsh and Ryan “Harmonization and standardization of legal aspects of international trade” 1977 *Australian Law Journal* 608. See also Hayes “A modern *lex mercatoria*: Political rhetoric or substantive progress?” 1977 *Brooklyn Journal International Law* 210 and Cremades and Plehn “The new *lex mercatoria* and the harmonisation of the laws of international commercial transactions” 1984 *Boston Uniform International Law Journal* 317.

⁷⁰⁸ Gbenga (n 5)125.

uniform commercial law structure to facilitate trade and investment and the resolution of cross-border disputes in the region.⁷⁰⁹

It can be concluded from the report of the few cases⁷¹⁰ that there is a need for recognition of foreign proceedings, orders and officials, and the enforcement of foreign judgements in proceedings in SADC states. The *Sackstein NO v Proudfoot SA (Pty) Limited*⁷¹¹ case demonstrates the consequences of lack of co-operation and the need for an appropriate legal facility to provide for cross-border claims.⁷¹² The facts of the case are as follows: Tsumeb Corporation Limited, a Namibian company was registered in South Africa as an external company.⁷¹³ Both companies were placed under provisional liquidation in Namibia and South Africa respectively.⁷¹⁴ As a result of a scheme of arrangement entered into in terms of Section 311 of the Namibian Companies Act,⁷¹⁵ Tsumeb Corporation Limited Namibia was discharged from liquidation, meaning it was no longer insolvent. Sackstein was appointed liquidator in South Africa. Instead of approaching the Namibian High Court for recognition with a view to invoking the Namibian avoidance,⁷¹⁶ Sackstein brought an action against Proudfoot Limited, a South African company to recover payments made to it by Tsumeb Corporation Limited Namibia⁷¹⁷ on the grounds that Tsumeb Corporation Limited Namibia and South Africa were one and the same entity.

⁷⁰⁹ See “China as a river of regional integration in Africa: Prospects for the future” available at: <http://www.ccs.org.za/downloads/DBSA%20Conference%20Report.pdf>; accessed 16 December 2011.

⁷¹⁰ *Sackstein NO v Proudfoot SA (Pty) Limited* (2003) 4 SCA 348-360; *Ward v Smit and Others: In Re Gurr v Zambia Airways Corp Ltd* (1998) 3 SA 175-18; see “Cross-Border Insolvency: Chapter (ch) 32 South Africa” available at http://www.insol.org/pdf/cross_pdf/South/%20Africa.pdf; accessed 26 January 2012.

⁷¹¹ (2003) 4 SCA 348-360.

⁷¹² Ailola 1999 *CILSA* (n 63) above (hereinafter referred to as Ailola).

⁷¹³ S323 Companies Act 61 of 1973.

⁷¹⁴ Namibia on the 29 April 1998 and South Africa on the 29 July 1998.

⁷¹⁵ That was on the 10 March 2000.

⁷¹⁶ *Boraine “Avoidance provisions in a local and cross-border context: A comparative overview” 2008 INSOL International, Technical Series Issue 21-22.*

⁷¹⁷ This was in terms of s29 (1) dealing with voidable dispositions and s30 dealing with voidable preferences of the Insolvency Act 24 of 1936.

The question that arose was whether Sackstein was entitled to impeach voidable transactions relating to the property of a company situated outside the Republic? In reliance on the South African Insolvency Act⁷¹⁸ and the doctrine of territoriality, the Witwatersrand Local Division held in favour of Proudfoot, on the basis that “the South Africa liquidator (Sackstein) had no power to impeach these dispositions”⁷¹⁹ because it was an act of the Namibian company and not that of the South African company, and also because the liquidators’ powers to impeach could only be exercised in respect of the transactions in their respective countries.⁷²⁰

Within the OHADA context, there would have been a different and more desirable outcome, because countries are subject to a certain legal regime. It is important to note that the OHADA Insolvency Act applies in and outside formal insolvency,⁷²¹ and the insolvency representatives are known as an “administrator” in the case of business rescue, and a “liquidator” in the case of a company that ceases trading. It is equally important to note that dispositions made during the suspect period (*période suspect*)⁷²² can be set aside by the court upon the administrator’s request.⁷²³ This is to avoid any preferential treatment of a creditor over other creditors, or fraudulent transfer of the debtor’s assets. In so doing, the administrator must prove that such disposition was not made for value, but that it was made in the ordinary course of business.⁷²⁴ Had Sackstein’s case occurred within the OHADA region, the companies would have been regarded as the same entity, and Sackstein would not have had to apply for recognition because recognition is automatic. All he would need to do is to collaborate with the administrator of the parent company in the setting aside of the disposition in accordance with the Insolvency Act.

⁷¹⁸ Ibid.

⁷¹⁹ Smith and Boraine 2004 SA Mer. LJ (n 51) above (hereinafter referred to as Smith and Boraine).

⁷²⁰ Ibid, 499

⁷²¹ Art 69 OHADA Insolvency Act 1999.

⁷²² Suspect period is the period between the date of insolvency and date of Judgment. This is limited to a period of 18 months.

⁷²³ Art 67 OHADA Insolvency Act.

⁷²⁴ Ibid, art 69.

Apart from the difficulties encountered in seeking to collect assets in a foreign jurisdiction, the risk that local creditors face in receiving payment from a foreign company registered as an external company, is another major problem.⁷²⁵ Scott⁷²⁶ in the leading case of *Ward v Smith and others: in re Gurr v Zambian Airways Corporation Ltd*⁷²⁷ avers that “where there is both local *concursum* and a foreign *concursum* (proceedings), it may well be that one group of creditors will either be favoured or disadvantaged, depending on the location of the company’s assets”. By implication, creditors in the country in which the debtor’s assets are located would be highly favoured. This is evident in South Africa, where under common law rules, local creditors enjoy preference over foreign creditors on assets located within the Republic.⁷²⁸ Accordingly, the words of Forsyth are very important when he said “only those whose whole cause of action arose within the republic or who is an incola of the republic shall.... acquire any right to prove secured or preference claim”.⁷²⁹

Equally, the question of recognition and enforcement of foreign proceedings, orders and officials remain a largely domestic matter. South African courts, like its counterparts in other SADC states, require the trustee or liquidator of the debtor who wishes to retrieve assets in a foreign state to file a request for recognition with the relevant foreign court,⁷³⁰ which in the respective countries may be done on the basis of comity and convenience.⁷³¹ In *Ex parte Wessels and Venter NNO: in Re Pyke-Not’s Insolvent estate*,⁷³² the South African court added a new condition for recognition when it stated that “recognition should only be given where the applicant can make out a prima facie

⁷²⁵ Smith and Boraine (n 719) 498.

⁷²⁶ Ibid, 33.

⁷²⁷ *Sackstein NO v Proudfoot SA (Pty) Limited, Supra* (n 711) above.

⁷²⁸ Franco “The cross-border insolvency Act: Lifting the barriers or creating new ones?” 2003 *South African Mercantile Law Journal* 31.

⁷²⁹ See *Ex parte Steyn* (1979) 2 SA 309 (0) 312c. This point was criticised by Smith and Boraine “The grab rules foils the foreign liquidator in his own Jurisdiction” 2004 *American Bankruptcy Institute Law Review* 184.

⁷³⁰ Bertelsmann *et al Mars the law of Insolvency in South Africa* (2008) 671.

⁷³¹ *Ex parte Palmer No: In re Hahn* (1993) 3 SA 359 (C); *Ex parte Stegmann* (1902) TS 40; *Moolman v Builders and Developers (Pty) Ltd* (1990) 1 SA 954 (A) 961C and *Clegg v Priestly* (1985) 3 SA 950 (W).

⁷³² (1996) 2 SA 681.

case or has a reasonable prospect of success”.⁷³³ It implies that an official seeking to recover assets must ensure that it has a reasonable chance of success. In Namibia, the courts can only confirm a provisional order or judgment, and cannot enforce a foreign judgment unless it is final.⁷³⁴

Another significant reason is to protect employees during insolvency. Corporate insolvency affects parties with interests⁷³⁵ and investment in the corporation, but its impacts on employees is significant.⁷³⁶ This is because of the contributions of productivity⁷³⁷ by the employees, and the losses they suffer. There is the risk of loss of employment, wage, and other compensation claims, and pension savings in case of pensioners. While there is broad acknowledgment of these losses, there is no uniform approach in the SADC regarding the protection of employees in the event of their employer’s insolvency. To illustrate this point, in South Africa, as in Namibia and Botswana, upon insolvency, there is a termination of contracts of employment subject to compensation for damages sustained because of such termination.⁷³⁸

The differences between SADC countries in this regard lie in the position of employees on the ladder of payments. In South Africa for instance, employees occupy the fifth position, sixth position in Namibia, and fourth position in Botswana.⁷³⁹ It should however be mentioned that these countries recognise the preferential rights of employees, but do not provide for compulsory insurance or guarantee a fund that will pay salaries and other benefits in arrears at the time of insolvency as provided in Part III of the ILO

⁷³³ Ailola (n 712) 63.

⁷³⁴ *Bekker No v Kotze and Another* (1996) 4 SA 1287 (Nm).

⁷³⁵ Sarra *Creditors rights and the public interest, restructuring insolvent corporations* (2003) 70.

⁷³⁶ Sarra “Widening the insolvency lens: The treatment of employees claims” in Omar J (ed) (2008) 295.

⁷³⁷ Employees contribute to the productivity of a firm in terms of their labour inputs, time, energy and loyalty which enhances the firm’s value.

⁷³⁸ In South Africa, contracts of employment terminates 45 days after the appointment of the final trustee or liquidator; s38 Insolvency Act (IA) 24 of 1936. Same applies in Namibia (s38 IA 61 of 1936) and Botswana (s38 IA 1929).

⁷³⁹ S96-103 South Africa IA, s96-103 Namibia IA and s82-88 Botswana IA. Within OHADA, employees occupy the first position; art 162 Insolvency Act.

Convention on Insolvency,⁷⁴⁰ an indication that in the event of bankruptcy, employees are paid from the proceeds of the insolvent estate.

Another significant difference lies in the rights and obligations of employees in respect of transfer of an undertaking under insolvency circumstances. In the South African context, once ascertained that a business is transferred in insolvent circumstances, the consequences are that the new employer is automatically bound to all existing contracts of employment, and all rights and obligations between the previous employer and each employee⁷⁴¹ unless otherwise agreed by the employees and the new employer in terms of Section 197 (6) of the LRA.⁷⁴² This implies that an employer cannot dismiss an employee for reasons related to the transfer, except after consultation with employees representatives upon disclosure of all relevant information during such agreement.⁷⁴³ In Namibia and Botswana, there is no express duty on the new employer to take over existing contracts of employees, or prohibition from dismissal for reasons related to such transfers.⁷⁴⁴ Consequently, there would be unfair competition and the risk of a destructive race to the bottom or so-called “social dumping”.⁷⁴⁵ Hugh Mosley explains how the phenomenon of social dumping operates:

Social dumping as a type of unfair competition based in sub-standard employment practices could take place in at least three inter-related ways: (1) through the displacement of high-cost producers by low-cost producers from countries in which wages, social benefits and the direct and indirect costs entailed by protective labour legislations are markedly lower; (2) firms in high labour cost countries would be increasingly free to relocate their operations, thereby strengthening their bargaining power vis-à-vis their current workforce...to exert downward pressure on wages and working conditions; (3) individual states might be tempted to pursue a low-

⁷⁴⁰ 173 of 1992.

⁷⁴¹ S197A (2) (c) LRA.

⁷⁴² Boraine and Van Eck “A plea for the development of coherent labour and insolvency principles on a regional basis in the SADC countries” in Omar J (ed) 273-274.

⁷⁴³ S197 (2), 187 (1) (g) and 197 (6) South Africa’s LRA.

⁷⁴⁴ Boraine and Van Eck “A plea for the development of coherent labour and insolvency principles on a regional basis in the SADC countries” 282 and 289 (hereinafter referred to as Boraine and Van Eck).

⁷⁴⁵ Fey 1999 *Indus. LJ* (n 59) above. Social dumping has been defined as a situation where “goods produced by means of cheap labour... are exported to countries higher labour standards”; see Calitz 2008 *De Jure* 225 (hereinafter referred to as Calitz).

wage and perhaps even anti-union labour market strategy as part of their effort to catch up economically.⁷⁴⁶

Social dumping is detrimental to infant industries because it leads to unhealthy competition, and even the closure of the home industries. While businesses will be attracted to areas with low labour standards, labour will be attracted to areas with high standards. This inequality must be addressed for the economic growth of SADC countries. From this background, it is apparent that the SADC needs as a matter of necessity a uniform commercial law structure. After all, one of the SADC's objectives is "to harmonise [the] political and socio-economic policies and plans of [its] member states".⁷⁴⁷ Indeed, there is the need for a greater focus on the subject (development of a uniform commercial law structure in the SADC), but it is uncertain whether this can be achieved within the current SADC structure.

4.5 A uniform commercial law and the current SADC structure

It is assumed that effective and supranational institutions are imperative for the development of a uniform commercial law approach in the SADC. In this regard, the question is: Can a uniform commercial law structure be achieved within the current SADC structure? Practically speaking, a uniform commercial law structure cannot be achieved within the current SADC structure for a number of reasons. Firstly, there is the lack of effective and supranational institutions, due to the lack of political will on the part of some of the member states to cede some of their sovereignty to the SADC. The lack of effective and supranational institutions gives member states the opportunity to escape their international responsibility.⁷⁴⁸ Despite Zimbabwe's commitment to act in accordance with the rule of law, it has failed on several occasions to adhere to the decisions of the Tribunal.⁷⁴⁹ This played out in the case of *Mike Campbell (PVT) v Government of Zimbabwe*.⁷⁵⁰ It should however be mentioned that the white farmers were successful in having their verdict enforced in South Africa.⁷⁵¹

⁷⁴⁶ Mosley "The Social dimension of European Integration" 1990 *International Law Review* 147.

⁷⁴⁷ Art 5(2) (a) SADC treaty.

⁷⁴⁸ Paras 4.2.8.2 above.

⁷⁴⁹ Paras 4.2.8 above.

⁷⁵⁰ Mike Campbell's case *Supra* (n 38) above.

⁷⁵¹ Paras 4.2.8.2 above.

In *Richard Thomas Etheredge v The Minister of State for National Security responsible for lands, land reform and resettlement and Senator Edna Madzongwe*,⁷⁵² the judge refused to enforce the interim ruling of the Tribunal on the grounds that: "... it is not a judgment it can consider without reference to the protocol that brought it into force as well as the SADC treaty". The judge further noted that: "... the supreme law in this jurisdiction is...the Constitution of Zimbabwe and it has not made provision for the courts to be subject to the Tribunal. Therefore, the [constitutional] court is a court of superior jurisdiction and has an inherent jurisdiction over all matters in this country, and its jurisdiction can only be ousted by a statutory provision to that effect ..."⁷⁵³ The government of Zimbabwe equally refused to enforce the judgment of the Tribunal on the grounds that it would be "fundamentally contrary to public policy of [the] country".⁷⁵⁴

The lack of political will by Zimbabwe to comply with the decisions of the Tribunal has frustrated the drafters' initiatives, which was geared towards creating an effective and supranational entity-Tribunal.⁷⁵⁵ Despite the lack of political will if not resistance on the part of Zimbabwe, there is no enforcement mechanism against defaulting states.

Unlike OHADA, in the SADC there is no strong, independent, and supranational judicial organ for the settlement of disputes. There is a vacuum in the judicial security mechanism in the region. The consequences are that investors (individuals and juristic persons) are deprived of their fundamental right of access to justice, and will not be provided with judicial certainty in the interpretation of the laws and settlement of business related disputes, and, hence, investment is deterred. This harsh reality needs to be taken into account in the on-going debate about reforming the Tribunal so that it can effectively discharge of its mandate.⁷⁵⁶ As Knott notes, the "Tribunal as the community's judiciary is not best placed to play the counterpart to member state governments, but should ideally have the role of an arbiter within the institutional setting

⁷⁵² *Supra* (n 681) above. See Ebobrah and Nkhata 2010 *CILSA* (n 681) above.

⁷⁵³ *Cistac* (n 581) 8-16.

⁷⁵⁴ *Supra* (n 659) above.

⁷⁵⁵ Vines "Regional Integration in Southern Africa: Challenges and Opportunities" (speech delivered to The *Instituto Superior de Relacoes Internacionais* 26 March 2008 in Maputo, Mozambique). See Gubbay 'The progressive erosion of rule of law in Zimbabwe' *New Zimbabwe* 1-5.

⁷⁵⁶ Hassane *et al International financial institutions and global legal governance* (2012) 118.

of the community, guaranteeing a supranational rule of law”.⁷⁵⁷ For the benefits of the SADC citizens, the committee of ministers should be given the opportunity to provide the needed direction that will allow the challenges of the Tribunal be resolved.⁷⁵⁸ Hence, without supranational institutions to give effect to universal rules, the very purpose of uniformity will be defeated and the laws “become ineffective due to lack of effective remedies in the case of breach”.⁷⁵⁹ Therefore, for a uniform commercial law approach in the SADC, the Tribunal must be improved.

In improving the Tribunal, the SADC Tribunal should have human rights and economic mandate to handle all disputes arising between the member states and private persons. This liberal approach constitutes a fair and transparent process because it gives everyone the opportunity to be heard. This is coupled with mutual trust and respect for each member states’ national judicial competence. This gives national courts the “opportunity to address international disputes with [their] own means and within the framework of its own domestic system”.⁷⁶⁰ Since direct access is open to abuse in the sense that a litigating party might well choose this route in an attempt to delay procedure, access to the Tribunal is subject to certain requirements. Natural or legal persons may only refer a case to the Tribunal after exhaustion of all local remedies pertaining to the matter.⁷⁶¹ By implication, a natural or legal person may not make reference to the Tribunal before the injured party has exhausted all local remedies. Nevertheless, failure to exhaust local remedies should not constitute a bar where the local remedies are futile or provide no reasonable possibility of effective redress⁷⁶² or if the injured party can establish the failure of the domestic court to afford a remedy.

There are positive aspects of not limiting the jurisdiction and powers of the Tribunal. The extended scope or status of the proposed tribunal will safeguard the interests and

⁷⁵⁷ Knott, “How to reboot the SADC Tribunal? Some ideas on sustainably enhancing the supranational rule of law in Southern Africa” 4 (hereinafter referred to as Knott).

⁷⁵⁸ Makonese 2013 *De Rebus* (n 672) above (hereinafter referred to as Makonese).

⁷⁵⁹ Kruger (n 554) above.

⁷⁶⁰ Dugard (2005) 293 (hereinafter referred to as Dugard).

⁷⁶¹ Art 15 (2) Protocol on Tribunal and Rules of Procedure Thereof 1992 (hereinafter referred to as the Tribunal Protocol). Art 14 SADC treaty.

⁷⁶² Dugard (n 760) above.

integrity of the common system. Secondly, it will ensure uniformity in the interpretation and application of community law, the respect of community law and rule of law in the region.⁷⁶³ It will equally assure disputing parties of justice and fairness in the settlement of their disputes.

Also, the Tribunal should be empowered to provide authoritative and final interpretation of disputes relating to the community law. To achieve this, it is significant for the member states to ratify the SADC Protocol. This will give the Tribunal a stronger voice in shaping the rules emerging from the community and hence, will enhance the success of the SADC regional approach.⁷⁶⁴ That being said, it is clear from the above that there is the need for the proposed Tribunal to be clothed with exclusive jurisdiction over disputes relating to community law between individuals, juristic persons and member states.

4.6 Conclusion

The chapter demonstrates the differences between the SADC and OHADA. In this regard, it is observed that OHADA operates a uniform commercial law system and SADC does not. Even though the SADC does not operate a uniform commercial law system, the chapter further demonstrates the need for such an approach. As to whether such an approach can be achieved within the current SADC structure, the author answers in the negative by pointing out some of the deficiencies inherent in the current structure. First of all, there is a lack of political will on the part of some leaders to take the integration project of the SADC forward. The existence of a reliable judicial system is a relevant consideration when investing in a region, the absence of which complicates business decision-making. Along the same lines, there is the absence of an independent and supranational judicial organ for the settlement of disputes arising between private persons relating to community law and the lack of enforcement measures, which creates uncertainty in the minds of investors.

⁷⁶³ Ibid, 5.

⁷⁶⁴ Oppong (n 23) 928.

Nevertheless, there are grounds for believing that uniform commercial legislation can be developed in the SADC. The institutionalisation of the SADC as a co-ordinating organisation for regional development and the Code of Ethics and Professional Conduct of the Association of Insolvency Practitioners of Southern Africa (AIPSA),⁷⁶⁵ now the South African Restructuring and Insolvency Practitioners Association (SARIPA), point to this commitment.⁷⁶⁶ The similarities in the concepts,⁷⁶⁷ types of business entities,⁷⁶⁸ and processes of establishment also point to this commitment. The most common forms of business entities are the public and private limited companies, which correspond largely to those in francophone African countries, in particular OHADA countries, where the most common types of business entities are the SA and the SARL. All these similarities make it less difficult to reach consensus.

The development of commercial legislation is capable of early realisation if carefully approached. Even if it is not envisaged at present, it should be established because no similar international instrument has yet been established in the SADC. The development of uniform commercial law structure in the SADC will be the beginning of a new process.⁷⁶⁹ However, the issue lies not in the enacting of treaties stipulating common rules, but in the adherence to these shared norms. Thus, if a uniform commercial law structure has to come into force within the current SADC structure, it will require the intervention of the heads of state who are the final arbiters of their internal policies, and improvement in the current SADC structure. If the SADC undertakes to harmonise its

⁷⁶⁵ This Code of Ethic and Professional Conduct sets out the standards of conduct required of insolvency practitioners of the region. Violation of the principles constitutes an improper conduct punishable by a fine not exceeding 2000 Rands or cancellation of a member's membership; see Cronje "Study Notes: Diploma in insolvency law and practice" University of Pretoria 354 (2010, unpublished and on file with author).

⁷⁶⁶ Latigo "Mainstreaming regional integration in national development plans "2 (2010, unpublished and on file with author).

⁷⁶⁷ These include: insolvency test, concepts of par value of shares, authorised capital and external companies.

⁷⁶⁸ Two types of companies may be formed incorporated in South Africa, Namibia and Botswana: a company with a share capital and a company without a share capital; see Pretorius *et al* South African company law through the cases (1999) 38-39. See also Thornton 2007. <http://www.gta.co.bw/publications/companies-act/publications/June07.pdf> at 1.

⁷⁶⁹ Slater "The transnational law of syndicated loans-a hopeless cause" in Horn N *et al Transnational law of international commercial transactions* (1982) 352.

commercial laws,⁷⁷⁰ the moot points will be whether OHADA can serve as a model and whether the current SADC structure should be improved to deal with uniform commercial legislation; the author posits that it should. If the SADC structure should be improved, what are the likely paths along which it can be improved?

⁷⁷⁰ Attempts are underway towards the modernization and harmonization of business laws in the SADC. The technical workshop and the Second International Conference both of which the author was in attendance sought to identify the areas to be harmonized and the way forward. At the Second International Conference, the author highlighted the need to harmonize the company, insolvency and labour laws of the member states. See (n 582) above.

CHAPTER 5: The OHADA Structure as a Possible Model for the Development of a Commercial Law Structure in the SADC

5.1 Introduction

Legal integration is aimed at reducing legal uncertainty associated with international business by enhancing legal predictability and security,⁷⁷¹ with a view to increasing trade between the member states of a regional integration organisation.⁷⁷² Legal integration also gives member states of a regional organisation the opportunity to engage in a global economy, and prudently regulate international business (cross-border activities) to enhance stability and development.⁷⁷³ In pursuit of the economic objective of the SADC which is to promote sustainable and equitable growth which will lead poverty alleviation, member states are encouraged to develop policies that can lead to the elimination of obstacles to the free movement of people, goods, labour, capital and services.⁷⁷⁴ With this, if the SADC undertakes to develop a commercial law structure,⁷⁷⁵ the moot point will be whether the OHADA structure can serve as a possible model, given that it is one of the more successful legal harmonisation projects in Africa.

In view of the importance of investment and development, the OHADA member states decided to create a secure legal framework governing business, the positive effects of which are visible in the member states. As to whether the benefits and results derived are commensurate with the efforts and costs expended, the thesis argues that OHADA has and has had “beneficial effects” on the member states. The legal framework has heightened the pace of reform in the member by making it easier for entrepreneurs to do business.⁷⁷⁶ In Senegal for example, it only takes five days to set up a business

⁷⁷¹ Carbonara and Parisi “The paradox of legal harmonization” 2007 *Public Choice* 369.

⁷⁷² Killander “Legal harmonization in Africa: Taking stock and moving forward” 2012 *Italian Journal of International Affairs* 83-84.

⁷⁷³ Fey (n 60) 1481.

⁷⁷⁴ Art 5 SADC treaty 1992.

⁷⁷⁵ See (n 770) above.

⁷⁷⁶ See ‘Progress in regulatory reform expands business opportunities across OHADA member states’ 2012 available at: <http://www.nigerianewsdaily.com/nigeria-news-more/nigeria-news-africa/17196-progress-in-regulatory-reform-expands-business-opportunities-across-ohada-member-states.html>; accessed 29 October 2013.

through its one stop center, the same as in Canada, while it takes 98 days in Burkina Faso to obtain a construction permit, three months faster than the EU average after four years of successive reforms.⁷⁷⁷ It has also made it possible for motor-taxi operators in Cameroon to register their businesses, to access credit and to own motorcycles.

The OHADA reform serves as impetus for legal reforms in Africa, but the question is whether OHADA has the potential to be a model law for the development of a commercial law structure in the SADC? Undoubtedly, OHADA has the potential of being a model for the development of uniform commercial laws in Africa, but some factors, such as the dominance of the French language and civil law, impede the realisation of this goal. Despite the success of OHADA, it is submitted that OHADA can only serve as a source of inspiration,⁷⁷⁸ or roadmap, providing guidance to the SADC drafters.

The primary purpose of this chapter is to highlight some of the lessons that the SADC may learn from OHADA in reforming its legal and institutional frameworks. This brief chapter is divided into four parts. The first part consists of this introduction; the second determines whether OHADA has the potential to be a model for the SADC. The third section highlights the lessons the SADC can learn from OHADA, and the fourth part concludes the discussion on this chapter. The benefits of this chapter lie in the lessons it highlights for the SADC in reforming its legal and institutional frameworks.

5.2 The OHADA structure as a possible model for the SADC

Other regional systems such as the EU, the North American Free Trade Agreement (NAFTA), and ASEAN have set up dynamic mechanisms in the fields of trade and economy, but have not reached the level of harmonisation achieved by OHADA, which explains why OHADA is of great international interest.⁷⁷⁹ In fact, OHADA has helped boost investment in the OHADA zone through harmonised business laws and an enhanced dispute resolution system which has helped to break-up existing malpractices

⁷⁷⁷ See (n 43) above.

⁷⁷⁸ The harmonisation of business law in the Caribbean (OHADAC) is inspired by the OHADA. See www.ohadac.com/www.acplegal.net; accessed 15 December 2011.

⁷⁷⁹ Keba 2010 <http://www.hg.org/article.asp?id=19603> at 1 (hereinafter referred to as Keba).

and provide assurance to investors.⁷⁸⁰ In terms of whether OHADA has the potential to be a model law for the development of a commercial law structure in Africa, Frilet⁷⁸¹ argued that “OHADA is a model dedicated to the progressive development of the rule of law in African countries that have a promissory future by many standards”. His argument is based on the fact that OHADA is not limited to the creation of model laws, but also offers dispute resolution mechanisms and training institutions for legal officers.

Highlighting the potential, Dickerson noted that, “OHADA may materially change the investment climate in west and central Africa. If successful, it offers a model for development in other parts of the developing world”.⁷⁸² OHADA is successful and provides practical example for implementation of legal reforms in Africa. This is founded on OHADA’s achievements in making it easier for economic operators to do business in the region. Chardon Mathiew⁷⁸³ concluded that “[the] OHADA Treaty is a culture, a remarkable frame of mind, an example and even a model for the international community”. On his part, Vermeulen⁷⁸⁴ stated that, “[a] model law process requires a common legal tradition” and OHADA serves as positive proof of this.

As mentioned, the OHADA harmonisation process only reflects the views and legal culture of its francophone states on which the Uniform Acts are largely based.⁷⁸⁵ Most of OHADA member states have a French colonial heritage, with the exception of the DRC (former Belgian colony), Guinea Bissau (former Portuguese colony), Equatorial Guinea (former Spanish colony) and Cameroon (partly under the British and French colonial rule). This civil law feel is reflected in the drafting of the Uniform Acts, interpretation and application of the Uniform Acts, trainings at ERSUMA and the conduct of proceedings at

⁷⁸⁰ Ibid.

⁷⁸¹ Frilet “Implementing the rule of law in Sub-Saharan Africa: Appraisal of the OHADA model after a decade” 2007 *International Business Law Journal (IBLJ)* 255.

⁷⁸² Dickerson (217) 20.

⁷⁸³ In the very words of Jacques Isnard, president of UIHJ said “there is no reason why what has been a success in the central and northern zones cannot be achieved in the southern zone”; International union of judicial officers 2007.

<http://www.uhj.com/en/historica-pan-africa-seminar-in-johannesburg-on-18-and-19-october-2007-1018332.html> at 1.

⁷⁸⁴ Vermeulen *The evolution of legal business forms in Europe and the United States: Venture capital, joint venture and partnership structures* (2003) 172.

⁷⁸⁵ Bourque (n 128) above.

the CCJA.⁷⁸⁶ This is to the exclusion of the common-law applicable in the anglophone regions of Cameroon, and of course raises concerns about the application of the Uniform Acts and the OHADA treaty in anglophone Cameroon.⁷⁸⁷

Indeed, OHADA has the potential to be a model for African countries, particularly countries with a civil law tradition who are contemplating a change in their commercial laws. Harmonisation, or unification of law, is made easier by a number of factors which factors include shared historical and cultural backgrounds, and similar legal systems and language.⁷⁸⁸ The common legal tradition, language and the use of common currency⁷⁸⁹ by OHADA member states are the factors behind its success. These factors have helped to change the investment climate in west and central Africa today. However, as long as the Uniform Acts are based on the civil law model, OHADA cannot serve as a model for the SADC. The basis of this lies in the fact that OHADA does not reflect the legal particularities of the SADC region.⁷⁹⁰

5.2.1 Dominance of civil law within OHADA

It is believed that before colonialism, African societies had no Western-style laws,⁷⁹¹ but instead applied laws that were shaped from ideas and experiences (African custom).⁷⁹² The aim here is to show that colonialism left Africa with diverse laws based on those enacted in the mother country.⁷⁹³ While English law dominated North America, Asia, Australia, and parts of Africa, French law applies throughout its colonies⁷⁹⁴ such as the

⁷⁸⁶ Art 63 OHADA treaty.

⁷⁸⁷ See ch 2 paras 2.3.

⁷⁸⁸ ECA (2006) 52-54 (hereinafter referred to as ECA 2006).

⁷⁸⁹ The CFA stands for *cooperation financière en Afrique Central* (translated in English as financial co-operation in Central Africa). It was created in 1945 when France joined the Bretton Woods Institutions and is today the common currency of the OHADA member states. It is issued by West African Economic and Monetary Union (UEMOA) and Economic and Monetary Community of Central African States (CEMAC) central banks.

⁷⁹⁰ Saadani (n 488) 486.

⁷⁹¹ Tamko "Lectures on comparative law" 49 (2004, unpublished and on file with author) (hereinafter referred to as Tamko).

⁷⁹² Ibid.

⁷⁹³ Gopalan 'From Cape Town to the Haque: Harmonisation Has Taken a Wing' 10 (http://www.law.upenn.edu/journals/jil/jilp/articles/1-1_Gopalan_Sandeep.pdf; accessed 22 August 2011) (hereinafter referred to as Gopalan).

⁷⁹⁴ Ibid.

French-speaking colonies of OHADA. Anglophone Cameroon⁷⁹⁵ is distinct from the rest of OHADA member states because it inherited the British common law system,⁷⁹⁶ while the rest of the member states inherited the French civil law from their colonial past, on which the Uniform Acts are largely based.

Unlike OHADA, colonialism left the SADC legal landscape with three major legal systems namely, the Common Law, Roman-Dutch Law (Romeins Hollandse Reg),⁷⁹⁷ and the Civil Law system, as well as mixed jurisdictions of different kinds⁷⁹⁸ consisting of a mixture of Roman-Dutch Law and Common Law (Botswana, Namibia, South Africa, Swaziland, and Zimbabwe) and Civil Law and Common Law (Mauritius).⁷⁹⁹ This implies that any reform process must reflect the legal particularities of the region. Since the OHADA harmonisation process does not reflect the legal particularities of the SADC, it is correct to say that without significant changes OHADA cannot serve as a model for the SADC. With regard to the changes made, OHADA Uniform Act on Contract is drafted along the lines of the UNIDROIT Principles.⁸⁰⁰

As Date-Bah⁸⁰¹ explained, “the UNIDROIT principles are neither common law nor civilian, but a genuine international synthesis of the contract law principles of the major legal systems in the world”. Fontaine pointed out that the advantage of this approach lies in the fact that “it represents ‘high quality codification’ of comparative law”.⁸⁰² For Babatunde,⁸⁰³ this “development enhances the prospect of common law jurisdictions to joining OHADA”. It also enhances the potential of OHADA being a model for the development of uniform contract law on the continent.

⁷⁹⁵ Anglophone Cameroon refers to the North and South West English speaking regions of Cameroon.

⁷⁹⁶ Tumnde (n 224) above.

⁷⁹⁷ The Roman-Dutch law is still applicable in South Africa and its neighbouring countries: Lesotho, Swaziland, Namibia, Botswana and Zimbabwe.

⁷⁹⁸ Mancuso (n 558) above.

⁷⁹⁹ See ch 4, para 4.1.1, table 4.1 above.

⁸⁰⁰ Babatunde 2009 *CILSA* 318 (Babatunde 2009).

⁸⁰¹ Date-Bah “The UNIDROIT Principles of International Commercial Contracts and the harmonisation of the principles of commercial contracts in West and Central Africa: Reflections on the OHADA Project from the perspectives of a common lawyer from West Africa” 2004 *Uniform Law Review* 271.

⁸⁰² Fontaine “The Draft OHADA uniform Act on Contracts and the UNIDROIT Principles of International Commercial Contract” 2004 *Uniform Law Review* 577.

⁸⁰³ Babatunde(n 800) above.

5.2.2 *Dominance of the French language*

Closely related to the above problem is the dominance of the French language. Article 42 of the OHADA treaty provides, “*Le française est la langue de travail*”, meaning French is the working language of OHADA, which is unsurprising considering that the majority of OHADA member states are francophone, except for anglophone Cameroon (English), Equatorial Guinea (Spanish), and Guinea Bissau (Portuguese). In recognition of the difficulties raised by Article 42 of the treaty, the provision of Article 42 has been amended providing for four official languages: French, English, Spanish, and Portuguese.⁸⁰⁴ Unfortunately, the revised treaty has not resolved the difficulty created by the old Article 42. French remains the working language in the drafting of the Uniform Acts and conduct of proceedings at the CCJA.⁸⁰⁵ On the other hand, the SADC recognises the linguistic diversity of the region in the interpretation, application and settlement of disputes between member states.

Towards the enhancement of language diversity in the region, Article 37 of the SADC treaty provides, “the working of SADC shall be English, French, Portuguese and other such languages as the COM may determine”. Although the SADC has adopted a trilingual language policy, the only area where the trilingual policy is implemented is with respect to documentation related to conferences and summit meetings because of lack of funds and staff to efficiently translate documents into the three languages. Consequently, English is the most dominated in practice. OHADA’s choice of language does not accommodate SADC’s trilingual language policy that recognises English, French and Portuguese and as such, cannot serve as possible model for the SADC.

The dominance of the French language and the difficulties it raises isolate non-francophone African countries from OHADA’s standardisation process⁸⁰⁶ and even from the implementation process. As a consequence, anglophone lawyers and judges have been reluctant to refer their cases to the CCJA, fearing that they may be challenged

⁸⁰⁴ See art 42 Revised OHADA treaty.

⁸⁰⁵ Thouvenot 2006 *IBLJ* 3 (hereinafter referred to as Thouvenot).

⁸⁰⁶ *Ibid.*

based on inconsistency with that in French.⁸⁰⁷ Other non-francophone countries have not honoured their invitations to join OHADA. Babatunde⁸⁰⁸ indicated that “the membership of [other African states] such as Nigeria and Ghana ... will not only boost OHADA, but also fast-track its goal of becoming the model law for harmonisation of commercial laws on the continent”. Along the same lines, the establishment of an English version of the Uniform Acts and continuing education will provide better understanding of the business laws, which in turn may enhance the realisation of Article 53 of the OHADA treaty by enabling other members of the AU to join the organisation.

Having discussed the potential of OHADA, and the reasons why OHADA cannot serve as a model law for the SADC, the author now considers the lessons that the SADC drafters could draw from OHADA.

5.3 Lessons for the SADC

Even though OHADA cannot serve as a model for the SADC for reasons previously discussed, there are some lessons that the SADC drafters may learn from OHADA's experiences discussed in the preceding sections.

5.3.1 The collective nature of OHADA

If there is anything to be learned from OHADA's harmonisation process, it is that collective effort is necessary in an era of globalisation.⁸⁰⁹ There is member states and institutional collaboration among OHADA institutions in the enactment of the uniform rules. When states cooperate in the enactment of uniform rules, the end results should be that the contracting states would enjoy modern and accessible laws. The advantage of this is that it facilitates trade and the movement of assets from one country to another

⁸⁰⁷ Tabe-Tabe (n 147) 18. See Eyike “Le Droit international devant le juge Camerounaise: Regards d'un magistrat” 2005 *Jurisdís Périodique* 100-106 (translated as “International law before a Cameroonian judge: Magistrate's regards”).

⁸⁰⁸ Babatunde (n 803) above.

⁸⁰⁹ See ‘What is Globalisation’ available at: http://www.globalisation101.org/What_is_Globalisation.html; accessed 25 November 2011.

and the settlement of cross-border disputes.⁸¹⁰ The collective nature of the settlement of cross-border disputes is aimed at ensuring an orderly and equitable distribution of assets.⁸¹¹

Briefly, commitment by states is a prerequisite for a successful integration process and without it, the whole project will be unlikely to materialise. As Ruppel points out, “without political will and good faith on the part of ...states to meet and comply with their obligations as spelt out in ratified treaties and conventions, economic regional integration is likely to remain a concept on paper”.⁸¹² In the same way, the SADC member states must be prepared and committed into improving the legal and judicial environment. In doing so, they should cede part of their sovereignty to SADC institutions. The transfer of sovereignty is an indication that the members are prepared to commit into the harmonisation of their commercial laws and the improvement of the SADC’s current structure. Most importantly, they must be prepared to respect the decisions or judgments of SADC institutions.

5.3.2 OHADA is business inclined

The business related nature of OHADA is affirmed in Article 1 of the OHADA treaty. Pursuant to Article 1, OHADA has put in place a comprehensive set of laws and regulations for business and commercial activities.⁸¹³ The Uniform Acts are intended to secure business transactions between the member states, particularly to attract foreign investments and, hence, to promote economic development.⁸¹⁴ The provisions of the Uniform Acts are self-executing and enjoy precedence over nationally enacted commercial laws.⁸¹⁵ This implies that upon ratification of the OHADA treaty by a state, the state becomes automatically bound by the provisions of the treaty and the Uniform Acts.⁸¹⁶ This eliminates any possibility of escape from international obligations by

⁸¹⁰ Ibid.

⁸¹¹ Arts 72 and 75 *Insolvency Act* 1999.

⁸¹² Ruppel “The case of Mike Campbell and the SADC Tribunal under review” 12 (2011, unpublished and on file with author).

⁸¹³ Art 2 OHADA treaty.

⁸¹⁴ Ibid.

⁸¹⁵ Ibid, art 10.

⁸¹⁶ Ibid, art 2.

contracting states, and thus creates a sense of unity of purpose among the contracting states.

Article 10 of the treaty provides *expressis verbis* the principles of direct effect and supremacy of the Uniform Acts over national laws. By the provisions of article, the Uniform Acts are directly applicable in the member states and override national legislations in the event of a dispute. This is an element of the principle of *pacta sunt servanda*, according to which the “[member states] have the obligation to observe”.⁸¹⁷ From this provision, OHADA member states choose to adopt the monist theory,⁸¹⁸ which is derived both from the constitutional provisions of the member states and the treaty itself. This signifies the willingness of the member states to relinquish a measure of their sovereignty to promote economic development through the establishment of modern commercial rules,⁸¹⁹ and the loyalty and fidelity on the part of the member states in the observance of international obligations.

Because the provisions of the treaty and the Uniform Acts are automatically binding upon ratification, the treaty makes no provision for sanctions. To ensure an effective application of enacted uniform commercial rules in the SADC, the SADC must ensure that the uniform commercial rules are self-executing; this is to avoid conflict of laws between the enacted rules and nationally enacted commercial rules, and to ensure legal certainty of the enacted rules.

5.3.3 OHADA is a legal investment tool

OHADA provides an improved legal environment through its modern uniform statutes that attract more foreign investment, induce intra- and inter-African investments, and create a channel for business opportunities in OHADA countries.⁸²⁰ The OHADA

⁸¹⁷ Popescu ‘The relationship between national law, European law and international law in a multilevel governance system’ 1 (http://www.federalism.chi/files/FileDownload/918/Popescu_web.pdf; accessed 2 November 2011) (hereinafter referred to as Popescu).

⁸¹⁸ For a detail discussion on the theories of international law; see Brindusa 2007 (http://revcurentjur/achieva/attachements_200712/recjurid071_22F.pdf; accessed 4 March 2012) (hereinafter referred to as Brindusa).

⁸¹⁹ Oppong “Re-imagining international law: An examination of recent trends in the reception of international law into national legal systems in Africa” 2006 *Fordham International Law Journal* 307.

⁸²⁰ See <http://www.fubla.org/about>; accessed 19 February 2013.

corporate framework offers a wide range of business structures through which commercial activities can be conducted – private unlimited, sleeping partnership, private limited, public limited, joint venture, de facto partnership companies, and economic interest groups,⁸²¹ all of which are known in the SADC region. The one advantage of this is the fact that any person,⁸²² irrespective of their nationality or capital, wishing to engage in a commercial activity in the form of a company in one of the contracting states, is given the opportunity to do so by choosing from the forms of company provided for by the Companies Act.⁸²³ The most significant structure is the opportunity it creates for a single-person business.⁸²⁴

The new regulatory framework does not provide for the two-tier system of governance⁸²⁵ but adopts the two-tier board option,⁸²⁶ with management either in the hands of the board of directors (*conseil d'administration*) presided over by a chairperson or a sole managing director (*administrateur général*) acting as Chief Executive officer (CEO).⁸²⁷ Whether in the hands of the board or a managing director, there is no separation of the role of a chairperson from that of the CEO.⁸²⁸ These provisions add flexibility in the corporate form and in the interest of attracting foreign investment. Managing directors or board of directors, as the case may be are required at the end of each financial year to prepare a management report and a financial statement, in which they expose the evolution of the company, its financial situation and prospect of continuity.⁸²⁹ This helps in determining the financial condition of the company at too

⁸²¹ See ch 3 para 3.3.1.2 above.

⁸²² Anoukaha *et al* 2010 *Juriscopes* (n 265) above. See Paillusseau 2001 *Petites Affiches* 19-29 (translated as “Uniform Act on commercial companies”).

⁸²³ Baba “Harmonisation of business laws in Africa – An insight into the laws, issues, problems and prospects” in Dickerson (ed) *Unified business laws in Africa: Commercial perspectives on OHADA* (2009) 33-36.

⁸²⁴ Art 5 *Companies Act* 1998. See Nzalé (n 429) above.

⁸²⁵ The splitting of the board into a supervisory board and management; see Le Gall *et al* *French Company Law* (1992) 97.

⁸²⁶ Art 494 *Companies Act*. See Martor *et al* (n 342) 79-80.

⁸²⁷ *Ibid*, art 414. See also Martor *et al* (n 342) 80-89.

⁸²⁸ *Ibid*, arts 429-431. See Le Gall *et al* (1992) 425-429 (hereinafter referred to as Le Gall *et al*). The authors discussed the role of the President (Chairman), Director General (CEO) and the President Director General.

⁸²⁹ Arts 137-141 *Companies Act*.

early a stage and in the initiation of insolvency proceedings in the event the company is insolvent.

OHADA also adopts the concept of *intérêt social* (corporate interest) which in various sections of the Companies Act is identified as criteria for the definition of abuse by the majority⁸³⁰ by the minority shareholders.⁸³¹ In an SNC,⁸³² SCS,⁸³³ and SARL,⁸³⁴ the concept is used as criteria for delimiting internal powers of management in the absence of statutory dispositions. According to Dickerson, the concept of corporate interest is OHADA's first attempt to strike a balance between the needs of potential foreign investors and those of the region.⁸³⁵ At a minimum, the interest of the owners and third parties who contract with the corporation are protected (shareholder's primacy). An understanding of this vision includes the interest of the owners, the corporation as a whole, and third parties who contract with the corporation. In view of the minority views, corporate interest is nothing more than the individual and common interest of owners. At the maximum, the concept embraces all interests with the state interest inclusive. These include the owners, the community at large, suppliers, employees, and clients (stakeholder approach).⁸³⁶

The implementation of the stakeholder concept would indicate whether OHADA is flexible and protects property rights. Unfortunately, insufficient depositions have been developed to reveal whether OHADA corporate interest embraces these interests. Some scholars have persuasively questioned the relevance of this principle. Assi-Asso of the higher international law school considers the principle to be "irrelevant to the business realities in the region".⁸³⁷ The author, however, embraces the principle on the basis that it enhances productivity. Pougoue fully embraced the principle on the basis

⁸³⁰ Ibid, art 130.

⁸³¹ There is abuse by the minority shareholders when in the exercise of vote, opposed the adoption of decisions that are beneficial to the corporation; art 131 *Companies Act*.

⁸³² Ibid, art 277.

⁸³³ Ibid, art 298.

⁸³⁴ Ibid, art 328.

⁸³⁵ Dickerson (n 218) above.

⁸³⁶ Koné (n 412) 157-158.

⁸³⁷ Dickerson (n 128) 21.

that it prevents abuse without stating the type of abuse. Dickerson refers to abuse of power by managers in their dealings in the corporation.⁸³⁸ There is abuse of power when:

The majority of shareholders vote in favour of a decision which serves solely their interests, goes contrary to the interests of the minority shareholders, and cannot be justified in terms of the company's interest. This is regarding the misuse of power by majority shareholders/partners. As regards minority shareholders, they are liable for undue use of power when in voting, they object to decisions which are necessary for the company's interest, without legitimate reasons.⁸³⁹

The principle is also intended to communicate the importance of good governance to corporate managers, which plays a vital role in underpinning the integrity and efficiency of financial markets. It is equally protective of stockholders by assuring their long-term interests. An array of rights has been promulgated to encourage investment, and include the pre-emptive rights and double-voting rights.⁸⁴⁰ These rules are more about the rights of investors, and thus serve as a means of attracting foreign investment.⁸⁴¹ A pre-emptive right is a contractual and seasonal right, exercised only in the event of the new issuance of shares, but limited to the existing percentage of ownership. Basically, if a shareholder holds 20 percent of the shares of a company, in the event of new shares becoming available, the shareholder would be allowed to buy up to 20 percent of the new shares at the issue price.⁸⁴² This right is popular in France but not in the United States, where it is seen as a factor that limits management's ability to raise capital.⁸⁴³

The double voting right, on the other hand, is a right granted to shareholders who hold shares for at least two years in their own name. Though it is not clear whether this right

⁸³⁸ Ibid, 22.

⁸³⁹ Arts 130 and 131 *Companies Act*.

⁸⁴⁰ Dickerson (n 128) 25.

⁸⁴¹ See Dickerson "Ozymandias as a community project: Managerial/corporate social responsibility and the failure of transparency" 2003 *Columbia Law Review* 1035.

⁸⁴² Dickerson (n 128) 55.

⁸⁴³ Ibid.

encourages investment, it is designed to encourage investment and to preserve the status quo of a company.⁸⁴⁴

The new regulatory framework is protective of private rights, that is, shareholders' rights against management.⁸⁴⁵ In the protection of private interests and enhancement of capital formation, OHADA legislators have been very careful not to allow too much power in the hands of a single manager or group of managers. Company directors are prohibited from indulging in conflict transactions with the corporation; and may not accept loans or borrow from the corporation,⁸⁴⁶ unless it is a financial or banking institution.⁸⁴⁷ Company directors may not operate on their own, or for others, in the same category of business as the company they are serving, or engage in activities that harm the interests of the company. They are also required to inform owners of any matters likely to affect the smooth operation of the corporation. The disclosure of information is relevant because it serves to avoid abuse, and enhances transparency and predictability in an environment where legal sophistication is relatively scarce.⁸⁴⁸

The corporate framework equally defends the interests of shareholders through the alert mechanism otherwise called the early warning procedure (*procedure d'alerte*).⁸⁴⁹ This procedure is designed to alert management when it appears that the continuation of the company's activity is at risk.⁸⁵⁰ It is an innovation in the member states⁸⁵¹ and serves to guarantee and reassure investors of their investments. Such a procedure can be initiated by a shareholder⁸⁵² or statutory auditor.⁸⁵³ There are prospects that the future Uniform Act on Employments will create such an opportunity for staff representatives.

⁸⁴⁴ Ibid.

⁸⁴⁵ The OHADA does not allow for the management board/ supervisory board structure as is the case in France and Germany. See Werner and Mgodlwa 2006
<http://www.mpmagazine.com/display.asp?articleid=D0128CE7-44FB-9049> at 1.

⁸⁴⁶ Art 450 *Companies Act*.

⁸⁴⁷ Ibid, art 350.

⁸⁴⁸ Dickerson (n 128) 23.

⁸⁴⁹ Martor "The OHADA legal harmonisation process: The benefits for Africa's development" 17-29 (2003, unpublished and on file with author).

⁸⁵⁰ Martor *et al* (n 147) 68-69.

⁸⁵¹ Arts 150-158 *Companies Act*.

⁸⁵² Ibid, arts 157 and 158.

⁸⁵³ Ibid, arts 151 and 154.

The new framework also creates the opportunity for the registration of companies and security interests through the Trade and Personal Property Creditor Register (*Registre du Commerce et du Cr dit Mobilier-TPPCR*).⁸⁵⁴ The TPPCR is the data bank for creditors regarding the security and degree of indebtedness of an individual or entity. The one benefit of the TPPCR is that it assures investors of their rights.⁸⁵⁵ The local and national commercial register is managed by a competent jurisdiction of the member states, while the regional commercial register is managed by the chief registrar of the CCJA who ensures proper filing of documents.⁸⁵⁶ The regional register indicates the business name of a trader, place of business, and nature of activity engaged in.

As for the creditors, a well-developed legal regime has been designed with traditional and more innovative enforcement measures.⁸⁵⁷ In this regard, the Uniform Act on Debt Recovery and Enforcement Measures gives consumers who are not traders the opportunity to seek for the traditional order of payment, or the more innovative order/method of property restitution (an innovation in the member states).⁸⁵⁸ Before the granting of these orders, a creditor may force the debtor to perform or take provisional measures (provisional seizure of assets) to preserve his/her right. A creditor who avail himself of this right does so at its own risk subject to full compensation in favour of the debtor for damage caused by such execution.⁸⁵⁹ Unlike in France, the CCJA makes it clear that a national court cannot stay such execution once engaged.⁸⁶⁰

In the case of *Epoux Karnib v Soci t  G n rale de Banque du C te d'Ivoire*,⁸⁶¹ the CCJA stated clearly that: "where the issue before the national court of appeal was one of stay of provisional execution ordered by a lower court, the CCJA was incompetent to

⁸⁵⁴ Ibid, arts 34-43.

⁸⁵⁵ Frilet "L'OHADA ou l'harmonisation du droit des affaires en Afrique: Une exp rience unique et une r alit  prometteuse" 2001 *International Law Forum du Droit International* 164 (translated as OHADA or harmonisation of business law in Africa: A unique experience and promising reality").

⁸⁵⁶ Art 20 *General Commercial law*.

⁸⁵⁷ See the *Debt Recovery and Enforcement Act* 1998.

⁸⁵⁸ Ibid. under the traditional method of payment, the debtor is required to pay the outstanding amount while under the innovative method; he is required to return the goods collected, see paras 5.3.4 below.

⁸⁵⁹ Art 32 *Debt Recovery and Enforcement Act*.

⁸⁶⁰ CCJA Judgements Nos. 002/2001, 012/2003 and 014/2003 of 19 June 2003.

⁸⁶¹ The CCJA Judgment 002 of 11 October 2011.

entertain an appeal against the decision of the national court of appeal as this was not in relation to a matter dealt with by the Uniform Act”.⁸⁶² This implies that once a provisional execution has been commenced, it cannot be stopped by a national court. This causes irreparable damage to the debtor and as a result, demands are made for the revision of article 32 of the Uniform Act on Debt Recovery and Enforcement Act.

OHADA provides for an efficient and effective insolvency regime whose rules of risk allocation are predictable, transparent and equitable in the treatment of similarly situated creditors. Practically, employees enjoy priority for unpaid amount due under their contracts of employments as ascertain by relevant national law.⁸⁶³ The insolvency regime is protective of the rights of creditors who lend capital or assets for use in a business enterprise. To this effect, the Act envisages the “creditor wealth maximisation vision” which sees insolvency as a process of collecting debts for creditors,⁸⁶⁴ and a response to the common problems faced by creditors.⁸⁶⁵ This of course protects vulnerable creditors, and increases the willingness of financial institutions and other creditors to provide financing for business activities and the purchase of equipment.⁸⁶⁶ Avoidance provisions are equally protective of creditors. The avoidance provisions are designed to prevent dissipation of assets by the debtor through the granting of preferential treatment and the entering of fraudulent transactions with intent to defraud the general body of creditors or delay payment.⁸⁶⁷

We should also take cognisance of the liability of company’s management when the company has become insolvent because of bad management. The liability may be for

⁸⁶² Fongang, Asuagbor and Anoukaha “Commentaries of the Uniform Act Organising Simplified Recovery Procedures and Measures of Execution” 2007 *Juriscope* 44.

⁸⁶³ Art 95 *Insolvency Act* 1999. See ch 3 para 3.3.2.1 above.

⁸⁶⁴ The *concursum creditorium mechanism*. The currency of creditors’ mechanism is well developed in Southern Africa.

⁸⁶⁵ Arts 72 and 75 *Insolvency Act*. See also Armour, *The Law and Economic of Corporate Insolvency: A Review*, Working Paper 2001 at 18-19.

⁸⁶⁶ Gutterman and Brown *commercial laws of East Asia* (1997) 29.

⁸⁶⁷ Martor *et al* (n 148) 159 -160. *Transaction entered within the suspect period are invalidated by the administrator*. Suspect period is an 18 months period counting from the date of insolvency to date of judgement putting the debtor into administration; art 67 *Insolvency Act*.

the whole or part of the company's debts as determined by the competent court.⁸⁶⁸ The court may also order for the sale of the directors' shares, the proceeds of which is used in payment of their debts.⁸⁶⁹ The court may equally commence insolvency proceedings against the director (s) for exercise of personal commercial activity⁸⁷⁰ or criminal proceedings, the penalties of which are defined by member states criminal laws. A further consideration is the cross-border provisions are part and parcel of the insolvency law and apply only to cross-border insolvency disputes between member states.⁸⁷¹

A further consideration is the treatment of executory contracts in insolvency. An executory contract, uncompleted or ongoing contract is one that has not been performed in full by the insolvent at the institution of insolvency proceedings.⁸⁷² As a general rule, insolvency or the granting of insolvency proceedings does not suspend or put an end to the insolvent's uncompleted or ongoing contracts.⁸⁷³ According to article 107 of the insolvency Act, "the cessation or payments ordered by a court decision shall not be a reason for cessation of a contract and any rescissory clause for such a reason shall be deemed unwritten, except in the case of contracts concluded with regard to the person of the debtor [that is contracts concluded by the debtor in his personal capacity] and those expressly provided for by the law of each contracting state".⁸⁷⁴

Apparently, the insolvency administrator alone has the power, regardless of the proceedings initiated, to demand the execution of ongoing contracts or to terminate the contract.⁸⁷⁵ The insolvency administrator acting in the interest of the general body of creditors (*concursum creditorum*), is required not to adopt a course which is prejudicial to the interest of the creditors. The insolvency administrator has 30 days within which to make his/her choice under penalty of automatic cancellation of the contract and

⁸⁶⁸ Art 183 *Insolvency Act*.

⁸⁶⁹ *Ibid*, art 185.

⁸⁷⁰ *Ibid*, art 189.

⁸⁷¹ Ch 3 paras 3.3.2.1 above.

⁸⁷² Sharrock and Van Der Linde *Hockley's insolvency law* (2002) 73.

⁸⁷³ Art 107 *Insolvency Act*.

⁸⁷⁴ *Ibid*.

⁸⁷⁵ *Ibid*, art 108.

damages in favour of the other party for cancellation of the contract.⁸⁷⁶ The other party shall become a part of the general body of creditors and the amount of damages due to him shall be added to the debts of the insolvent.

5.3.4 *Modern enforcement mechanisms*

Of significance in this regard is the adoption of the Uniform Act relating to Debt Recovery and Enforcement Act: *Acte uniforme portant organisation des procédures simplifiées de recouvrement et des voies d'exécution*.⁸⁷⁷ It is a protracted piece of legislation with 338 articles and is divided into two parts. The first part contains two major procedural possibilities: the traditional order to pay procedure, and the more innovative order procedure of restitution of goods.⁸⁷⁸ The second part contains simplified enforcements and rules of protective seizure of goods in relation to movables and immovables.⁸⁷⁹ To complicate matters further, no enforcement measure can be directed against a debtor subject to collective proceedings. This is because upon the commencement of collective proceedings, the assets of the debtor are taken over by the court, and sold for the benefit of the general body of creditors.

Additionally, there are no enforcement measures against persons who enjoy immunity.⁸⁸⁰ Article 30 of the Uniform Act on Debt Recovery and Enforcement Act does not provide details on the concept of persons enjoying immunity. Article 30 confers absolute power on member states to determine the beneficiaries. Internally, it includes the state and its diplomatic corps, as well as state corporations and public enterprises.⁸⁸¹ In the case of *University of Dschang v International Bank of credits and spending (BICEC) and Tonye Dieudonne*,⁸⁸² the university was declared a public

⁸⁷⁶ Ibid, art 109.

⁸⁷⁷ See (n 857) above.

⁸⁷⁸ Kruger (n 554) above.

⁸⁷⁹ To name but a few, there is sequestration of assets, seizure for sale, transfer of earnings and most importantly is the opportunity for a creditor to seize the debtor's property, property in the hands of a third party and sell it in satisfaction of his claim; see Tumnde "Cameroon offers a contextual approach to understanding the OHADA treaty and Uniform Acts" 62-64.

⁸⁸⁰ Art 30 *Debt Recovery and Enforcement Act*.

⁸⁸¹ Ibid, art 30(2). CCJA Judgment No. 043/2005 of 7 July 2005.

⁸⁸² Judgment of 11 September 2000. See Ebongo *La saisie attribution dans la jurisprudence de l'espace OHADA* (LLM-Dissertation University of Yaoundé II, Cameroon) 68 (translated as *Foreclosure within*

establishment with a scientific and cultural character, which, according to the court benefits from execution. This is to demonstrate that state establishments such as the universities are excluded from jurisdiction and execution. Internationally, OHADA institutions and its employees⁸⁸³ are excluded from jurisdiction and execution.

Immunity is a privilege accorded to certain persons according to their status in the society. It is a corollary of exemption, but distinct in that it covers all assets of the immured person, while exemption is only in respect of certain assets as stated by the national law.⁸⁸⁴ To improve understanding of the concept of immunity, it is worth considering the distinction between immunity from execution and immunity from jurisdiction. Immunity from execution means that enforcement may not be taken against a state, while immunity from jurisdiction means that the state cannot be sued before national courts.⁸⁸⁵ The principle of immunity from jurisdiction is founded on the concept of equality between states (*par in parem non habet jurisdictionem*), the principle of non-intervention in the internal affairs of a state,⁸⁸⁶ and the principle of separation of powers (on the basis that a tribunal cannot judge a foreign state without usurping the role of the executive in the field of foreign relations).⁸⁸⁷ In addition, it is founded on the principle of independence of states and the protection of the property.

The risks related to the exercise by a state of its prerogatives as public sovereign are of two distinct types: there is the risk that the state will invoke its immunity from jurisdiction and execution, and that it will refuse to appear before a foreign court or arbitration tribunal.⁸⁸⁸ The exercise of immunity by states is an obstacle to debt recovery and the exercise of commercial activity and as a result, individuals remain reluctant to contract with states. It also renders creditors defenceless and leaves them with no remedy. The question then, is how to overcome the barrier of immunity? The CCJA acknowledged the privilege granted to public companies, but required public companies to provide

OHADA).

⁸⁸³ Art 49 OHADA treaty.

⁸⁸⁴ Art 50 *Debt Recovery and Enforcement Act*.

⁸⁸⁵ Arts 42-43 OHADA treaty.

⁸⁸⁶ Art 2 (1) of the United Nations Charter 1948.

⁸⁸⁷ Allen *Legal Aspects of doing business with black Africa* (1981) 52.

⁸⁸⁸ *Ibid.*

compensation to their creditors.⁸⁸⁹ At the moment, the principle of compensation is the only way for a creditor seeking payment for its claim, but it is limited in the sense that only creditors whose claims are certain, liquid, and enforceable are entitled to compensation.⁸⁹⁰ Failing this, all possibility of compensation is excluded.⁸⁹¹

In spite of all efforts to the contrary, enforcement against the state has proven to be impossible. The SADC may consider adopting a similar approach by ensuring that creditors dealing with member states are compensated for any claim they might have against the state.

5.3.5 *Supranational organisations*

According to Rasamond, supranationalism is “the development of authoritative institutions of governance and network of policy-making activity above nation-states”.⁸⁹² OHADA is a supranational organisation with the ability to take legally binding decisions and directly apply regional laws. It is important to note here that the ability of OHADA to exercise supranational powers is based on the political commitment of the member states. OHADA only exercises powers conferred on it by the member states and cannot modify its powers. To a large extent, this factor has enhanced the successful functioning of OHADA.⁸⁹³ OHADA has witnessed the establishment of supranational institutions such as the Council and the CCJA, through which it exercises supranational powers.⁸⁹⁴ Laws adopted by the Council are supreme and prevail over national laws, while decisions rendered by the CCJA are set as precedents for the national courts.⁸⁹⁵

⁸⁸⁹ Art 32 (2) *Debt Recovery and Enforcement Act*. See also the French law 80-539 of 16 July 1980 relating to execution of judgments and art 9 of French law 94-504 of 22 June 1980 completing the dispositions of the above law.

⁸⁹⁰ A debt which is certain is one which is in existence and acknowledged by the debtor while a liquidated debt is one whose amount is ascertained in monetary terms; see art 1 *Debt Recovery and Enforcement Act*. See also Assi-Asso and Ndiaw *Recouvrement des Créances* (2002) 51-53 (translated as Debt recovery).

⁸⁹¹ Etoundi *OHADA, justice en droit OHADA* (2010) 52-53.

⁸⁹² Rasamond *Theories of European integration* (2000) 204.

⁸⁹³ Babatunde 2008 *De jure* 494 (hereinafter referred to as Babatunde 2008).

⁸⁹⁴ See ch 4 above.

⁸⁹⁵ Arts 10 and 20 OHADA treaty.

OHADA guarantees the rights of investors through the creation of a reliable judicial court to which investors (private individuals, corporations and states) can submit contractual disputes to arbitration under modern arbitration rules. If arbitration is the desired means, contractual parties are strongly advised to clearly spell out in their contract. Parties are at liberty to choose ad hoc arbitration under the Uniform Act on arbitration which does not provide for institutional framework or the CCJA rules.⁸⁹⁶ This is an important development for investors because it gives them the opportunity to submit disputes irrespective of the personality of their contractual party. It should, however, be stressed, that arbitration averts defences based on sovereign immunity from jurisdiction. This excludes, enforcement of arbitral award which may run into difficulties arising out of defences based on sovereign immunity from execution.⁸⁹⁷

Unlike the proposed SADC tribunal whose jurisdiction is limited only to disputes between the member states, OHADA adopts a liberal approach. Member states, natural and legal persons have direct access to the CCJA.⁸⁹⁸ OHADA also specify the nature of the legal instruments adopted and their effects in the national legal systems of the member states. The SADC may consider adopting a similar approach that goes beyond mere inter-governmental co-operation.

Given that OHADA's labour framework is yet to be implemented, the author strongly recommends the ratification and implementation of the SADC Charter on Fundamental Social Rights (the Charter)⁸⁹⁹ in order to pursue the economic objective of the SADC which is to promote sustainable and equitable economic growth and socio-economic development in the region. The Charter creates obligations, some of which are obligations to create an enabling environment to ratify and implement the Charter and core ILO Conventions,⁹⁰⁰ and to ensure equal treatment for men and women.⁹⁰¹ It is

⁸⁹⁶ Ch 3 para 3.2.5.2 above.

⁸⁹⁷ Martor *et al* (n 148) 263.

⁸⁹⁸ Ch 3 paras 3.2.5 above.

⁸⁹⁹ The SADC Charter on Fundamental Social Rights 23 August 2003 (hereinafter referred to as the Charter).

⁹⁰⁰ *Ibid*, art 5 requires member States to establish a priority list of ILO Conventions and specifically to ratify and implement the core conventions of the ILO. Seven core ILO conventions have been ratified by all member states of the SADC; see www.ilo.org; accessed 3 November 2013.

asked if “the charter... is only a paper tiger or whether it has any impact whatsoever in reality”⁹⁰² Unfortunately, the Charter is only a paper tiger and does not have any impact in reality because it has no direct effect in the member states, and as such, cannot be enforced directly. Also, there is no supervisory mechanism to ensure accountability on the part of the member states. It is argued that the Charter will have no real impact on the shop floor and the life’s of employees if the SADC does not give the Charter the force of national law and if there is no independent monitoring mechanism and a SADC tribunal to enforce decisions rendered on the subject matter.

Having highlighted some of the lessons the SADC can learn from OHADA, the question that remains is, what is to be done for the SADC in the development of uniform commercial law structure and improvement of its current structure?

5.4 Conclusion

Africa is not lagging behind in the development of commercial law rules. This follows OHADA’s moves towards the development of uniform commercial law rules, the fruits of which are visible in the member states. OHADA has paved the way for legal and judicial certainties in its member states by adopting uniform commercial laws that are directly applicable in the member states of OHADA, and establishing supranational institutions for the implementation of the Uniform laws. OHADA accepts the supremacy and direct effect of the Uniform Acts which creates rights and obligations for member states. As indicated above, the adoption of the Uniform Acts and establishment of supranational institutions have brought significant benefits to the member states; one of which is the enjoyment of modern commercial laws. However, as discussed above, the OHADA cannot serve as a possible model for the SADC because, *inter alia*, it does not reflect the legal peculiarities of the SADC region. On this basis, it is submitted that OHADA can only serve as a guide or roadmap for the SADC drafters.

⁹⁰¹ Arts 6 -12 of the Charter.

⁹⁰² Smit ‘SADC Charter on Fundamental Social Rights: First step to regional labor standards’ 2013 available at: http://www.upf.edu/gredtiss/pdf/2013-LLRNConf_Smit.pdf at 13 (hereinafter referred to as Smit).

In order to complement the work of OHADA, it is highly desirable for the SADC drafters to consider the practice of other regional integration arrangements as well as some international commercial law instruments. As Mazrui aptly admonished, “Africa must stand ready to selectively borrow, adapt, and creatively formulate its strategies for planned development”.⁹⁰³ To this extent, the EU experience and those of other regional and sub-regional initiatives in Africa are discussed. The consideration of other initiatives and instruments is to draw and adapt useful lessons for the SADC in the improvement of the current SADC structure, and the development of a commercial law structure in the SADC.

⁹⁰³ Mazrui and Tidy *Nationalism and new states in Africa* (1985) 48.

CHAPTER 6: Comparative Notes on the Harmonisation of Laws within various other Regional Integration Arrangements in Africa and the European Union

6.1 Introduction

As the SADC embarks on a journey of unifying its commercial laws and improving its current structures, efforts should be geared towards building on various other African and European models, because such models offer instructive lessons. It is useful to see how various other regional integration arrangement (RIA) models in Africa and the EU deal with the harmonisation of laws. The EU experience is presented because it is the most advanced in the world. In terms of the EU experience, it is worth mentioning that a uniform or harmonised commercial law can perfectly exist within a community having plurality of legal systems, cultures, and traditions.⁹⁰⁴ In order to achieve a uniform or harmonised commercial law system, the SADC community can harmonise either its substantive commercial laws, or the private international laws of its member states.⁹⁰⁵ Efforts in both directions within the OHADA community are evident.⁹⁰⁶

The aim of this chapter is to provide a general comparison on the harmonisation of laws within certain RIAs in Africa and the EU. To situate harmonisation, which is the focus of this chapter, the chapter begins with an exposition of various other RIA models in Africa and the EU model; followed by some comparative notes of RIA models in Africa and the EU model, and lessons to be learned by the SADC. The consideration of other regional schemes is to complement the work of OHADA. It must be stressed that the examination of the different RIAs in this regard serve as a basis for lessons to be learned by the SADC states in their move towards deeper legal integration in the community. The chapter is important because it provides the SADC with an opportunity to establish a more appropriate framework to absorb the pressures of multilateralism and globalisation,⁹⁰⁷ and most importantly it offers insights into other regional schemes' attempts towards harmonisation of law.

⁹⁰⁴ Oppong (n 23) above.

⁹⁰⁵ Ibid.

⁹⁰⁶ Ch 2 above and www.ohada.com; accessed 12 April 2012.

⁹⁰⁷ Ouattara 1999 <http://www.imf.org/external/np/speeches/1999/041499.htm> at 1 (hereinafter

6.2 Harmonisation of laws: A look at the African Union and various other regional integration attempts towards the harmonisation of laws

I can see no security for African states unless leaders like ourselves have realised beyond all doubts that salvation for Africa lies in unity. If we are to remain free, if we are to enjoy the free benefits of Africa's enormous wealth, we must unite to plan the exploitation of our human and material resources in the interest of all our people.⁹⁰⁸

The need has arisen for Africa to unite if the continent is to remain free and participate in the global economy on equal terms.⁹⁰⁹ The increasing relevance of unity has stimulated a special interest in regional integration. Joachim Chissano, President of Mozambique, stressed the importance of African integration and cooperation when he said:

We must help each other to improve our governance on the basis of friendship and mutual trust. It is only in this way that we can dissipate the negative image of our continent as an incapable Africa without a future.⁹¹⁰

President Chissano's speech illustrates the fact that in order for Africa to realise its goals, the African leaders must commit collectively to the goals and principles of regional and continental integration, which are explicitly stated in the NEPAD document and the AU's Constitutive Act.⁹¹¹

Recognising the relevance of unity and growth, African leaders have embarked on a number of initiatives both at the continental and sub-regional levels.⁹¹² At the continental level, African states belong to the AU, which helps to formalise the Pan-African version

referred to as Quattar). Ouattara shows that openness to the world through regional integration is not enough to address the challenges of globalisation. For him, it requires in addition, good governance, sound macroeconomic policies, unfailing transparency, a stable and rational regulatory and incentive framework; Trivedi *Regional economic cooperation and integration: COMESA, EU and SAARC* (2005) 9.

⁹⁰⁸ See Nkrumah *Africa must unite* (1963) 63.

⁹⁰⁹ InterAfrica Group "Economic dimension to the African Union" 1.

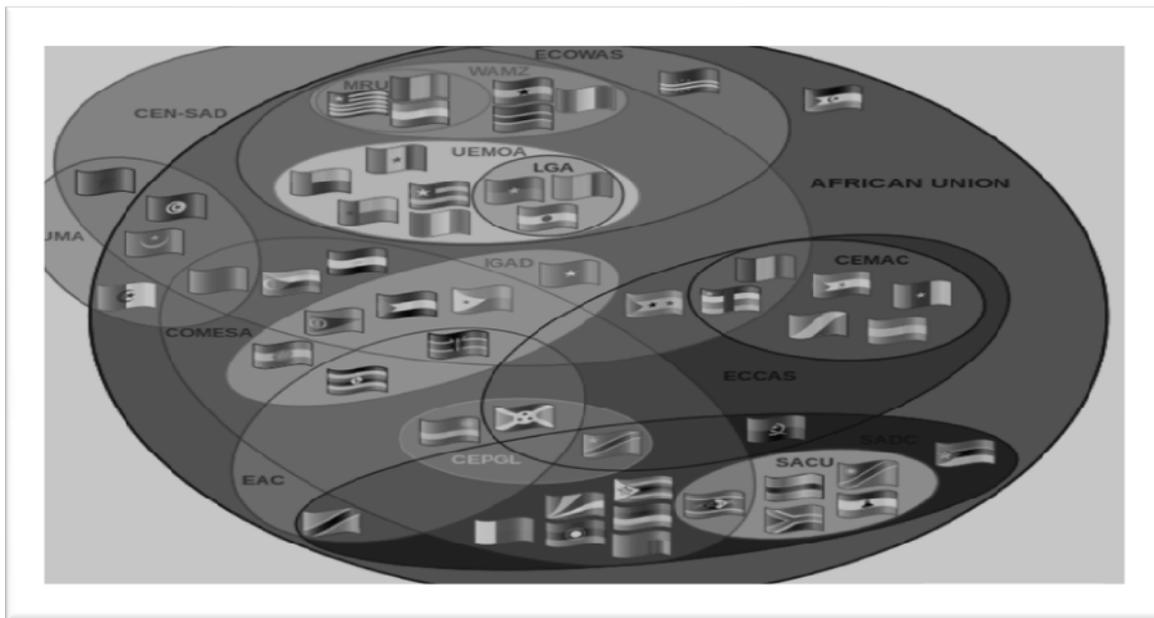
⁹¹⁰ Cape Times, 11 July 2003.

⁹¹¹ Hennie and Carly *African Elite Perspectives: AU and NEPAD - Comparative study across African Countries* (2003) 1 and 57.

⁹¹² Akokpari "Dilemmas of regional integration and development in Africa" in Akokpari J *et al The African Union and its institutions* (2008) 86. See also Nyerere "Non-Alignment in the 1970s" (1970) 12.

of continental integration and, in particular to “reposition Africa for the challenges of contemporary global *real politik*”.⁹¹³ At the sub-regional level, they belong to different sub-regional economic communities (RECs) each of which has a legal framework for attaining economic integration among its member states.⁹¹⁴

Figure 6.1: A Figure of Regional Integration Arrangements in Africa⁹¹⁵



A common thread that runs through the objectives of these RIAs in Africa is the enhancement of economic development chiefly through the harmonisation of the policies and laws of the member states.⁹¹⁶ This section is confined to efforts undertaken by the AU and various other RECs to harmonise the laws of the member states, and the

⁹¹³ Babatunde (n 371) v. See also Yang and Gupta “Regional trade arrangements in Africa: Past performance and the way forward” 2007 *African Development Review* 400-402.

⁹¹⁴ Ashimizo “Economic integration in Africa: Re-examining the capacity of the Africa” 2 (2010, unpublished and on file with author) (hereinafter referred to as Ashimizo).

⁹¹⁵ Figure taken from <http://www.panafricanperspective.com/aec.htm> at 1. This figure depicts the different regional integration arrangements (RIAs) entered into by African States with the African Union (AU) as the umbrella body embracing all the sub-regional arrangements.

⁹¹⁶ Babatunde 2009 (n 800) 309. See also Heyns and Killander (eds) *Compendium of key human rights documents of the African Union* (2006) 2-80.

factors hindering the maximal realisation of integration and harmonisation attempts in Africa.

6.2.1 *The African Union: Roadmap to continental integration*

The AU is an intergovernmental organisation consisting of 53 African states.⁹¹⁷ The architecture of inter-governmentalism includes states as privileged players in the integration process. The inter-governmentalism nature of the AU does not mean it cannot be transformed into a supranational entity, but the question remains whether the AU has the potential of evolving into a supranational entity. Before engaging with this question, it is worth pointing out that the AU's Constitutive Act⁹¹⁸ spells out the objectives of the AU and specifies the relevant organs with powers to adopt relevant instruments, but does not specify the legal status and effect of the AU decisions on the member states.⁹¹⁹ According to Zenda,⁹²⁰ this creates "a certain amount of legal uncertainty as to the very nature of [AU decisions]".

6.2.1.1 *Harmonisation of laws within the African Union*

As stated in the AU's Constitutive Act, the AU aims, among other things, "to achieve greater unity and solidarity between the African countries and the people of Africa; to coordinate and harmonise the policies between the existing and future RECs for the gradual attainment of the objectives of the Union".⁹²¹ The AU's Constitutive Act places the duty to coordinate and harmonise their policies on the RECs. The AU's Constitutive Act does not define the terms "harmonisation" or "coordination"; nevertheless, the call for the harmonisation and co-ordination of the policies and laws within the AU justifies the need for greater unity, solidarity, and equality between African states.⁹²²

⁹¹⁷ Du Plessis "the African union" in Dugard *International law: A South African perspectives* (2005) 549.

⁹¹⁸ The Constitutive Act of the AU was adopted in Lomé on 11 July 2000 and entered into force on 26 May 2001. It was amended by the Protocol on Amendments of 2003 which is not yet in force. (Hereinafter referred to as AU Constitutive Act).

⁹¹⁹ Babatunde (n 371)141.

⁹²⁰ Zenda *The SADC Tribunal and the judicial settlement of international disputes* (LLD-Thesis University of South Africa 2010) 521.

⁹²¹ Art 3 (a) (i) AU Constitutive Act.

⁹²² Ibid.

Writing in the context of harmonisation within the AU, a number of key instruments of the AU refers to the objective of harmonising the policies and laws of member states.⁹²³ The AU Convention on Preventing and Combating Corruption determines as one of its objectives the co-ordination and harmonisation of the policies and legislation between state parties for the purposes of prevention, detection, punishment, and eradication of corruption on the continent.⁹²⁴ Similarly, the treaty establishing the African Economic Community (AEC)⁹²⁵ underscores the need to “coordinate and harmonise the policies among existing and future economic communities in order to foster the gradual attainment of the community”.⁹²⁶ Remarkably, the RECs – the building blocks of the AEC – are not members/signatories of the AEC treaty, and there is no rule to bind the RECs’ agenda to the continental agenda. Since the REC treaties were drafted after the AEC treaty, one would have expected that the treaties would address the issue of their relationship with the AEC.⁹²⁷

The absence of a framework to bind the RECs’ agenda to the continental agenda hinders the attainment of the continental agenda, which is the establishment of an AEC. As a matter of necessity, the author suggests that the AEC treaties and those of the RECs should be amended. An important first step would be to amend the AEC treaty to provide for a compulsory merger and signing by the RECs. By compulsory merger, the treaty should provide the opportunity for RECs to merge. This will help to rationalise the impact of multiple membership.

The tripartite agreement entered into by the heads of state and government of the East African Community (EAC), the SADC and the Common Market for Eastern and Southern African States (COMESA)⁹²⁸ is a good example, and other RECs should

⁹²³ Ferreira-Synman and Ferreira “The harmonisation of laws within the African Union and the viability of legal pluralism as an alternative” 2010 *Journal of Contemporary Roman-Dutch Law (THRHR)* 608.

⁹²⁴ Art 2 (3) AU Convention on Pre-venting and Combating Corruption 2003.

⁹²⁵ 3 June 1991 but came into force on May 1994 (Otherwise called the Abuja treaty).

⁹²⁶ Ibid, arts 4(d) and 88(1).

⁹²⁷ Oppong “the African Union, the African Economic Community and Africa’s Regional Economic Communities: Untangling a complex web” 2010 *Africa Journal of International and Comparative Law (AJICL)* 97.

⁹²⁸ 22 October 2008.

follow suit. This agreement was entered into with the intention of creating an FTA by 2016. Significant strides have been made towards this end. So far, the Trade Sub-Committee has prepared a draft FTA roadmap, a draft agreement establishing the FTA including annexes on non-tariff barriers, rules of origin, customs co-operation, competition policy and law, and movement of persons, just to name a few.⁹²⁹ There are also prospects of an African free trade zone expected to be achieved by the end of 2018. According to Jean Ping, former chairperson of the AU Commission, it will be achieved through the merger of all African regional blocks.⁹³⁰ The amended treaty should also specify the implications of full signature, one of which will be that the RECs will be bound by all AU laws, including laws that aim at rationalising and co-ordinating their activities. This will help to minimise the potential conflicts of laws, policies, and jurisdiction.⁹³¹ Although it would be difficult to persuade RECs to sign the treaty, it is the only way forward, even if it is a lengthy process.

6.2.1.2 *A supranational African Union?*

As previously mentioned, the AU is not a supranational organisation but there is the intention on the part of the heads of states and government to confer supranational powers on the AU institutions, which information is gleaned from the preamble of the Constitutive Act:

We, heads of state and government of the member states...are determined to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them to discharge their respective mandates effectively.

The determination of the heads of states and governments of the member states to provide the common institutions with more powers and resources reveals their willingness to operate beyond inter-governmentalism. An example of this is the February 2009 decision of the Assembly of the AU (Assembly) to grant more powers to the AU

⁹²⁹ See http://www.comesa-eac-sadc-tripartite.org/intervention/focal_areas/tripartite_fta; accessed 25 June 2012.

⁹³⁰ See TradeMark Southern Africa (TMSA) 'Africa free trade zone in operation by 2018' (<http://www.trademarksa.org/news/africa-free-trade-zone-operation-2018>; accessed 25 June 2012).

⁹³¹ Oppong 2010 *AJICL* 98 (hereinafter referred to as Oppong).

Commission by transforming it into an AU authority.⁹³² The common institutions, referred to in the preamble, are listed in Article 5 of the Constitutive Act and include the Assembly of the Union; the Executive Council; the Pan-African Parliament; the Court of Justice; the Commission; the Permanent Representative Committee; the Specialised Technical Committees; the Economic, Social and Cultural Council; the Financial Institutions; and other organs that the Assembly may decide to establish.⁹³³

The Assembly is the supreme governing body of the AU. It consists of the 53 heads of state and government of the Union,⁹³⁴ who meet once a year in ordinary session upon request of a member state or two-third majority of the member states present. As the supreme decision-making body, it takes decisions and adopts resolutions by consensus or a two-thirds majority, while questions of procedure are decided by a simple majority. In addition, the Assembly determines common policies and monitors the implementation of the policies and decisions of the AU;⁹³⁵ it also has the power to impose sanctions on member states that fail to comply with the AU's decisions and policies.⁹³⁶

The Executive Council is composed of ministers of foreign affairs designated by the member states. Unlike the Assembly, it meets twice a year with the possibility of extraordinary sessions. It coordinates and takes decisions on common policies relating to foreign trade, transport, agriculture, and communication.⁹³⁷

The Pan-African Parliament (PAP) is based in Midrand, South Africa⁹³⁸ and provides a platform for the 265 parliamentarians directly elected by the legislature of the 53 AU states to participate in decision-making regarding the problems and challenges facing

⁹³² At the 12th Ordinary session held 1-3 February 2009 Addis Abba, Ethiopia, the AU Assembly took a decision to transform the AU Commission into an Authority – AU/Dec 233 (XII).

⁹³³ Art 5 (2) AU Constitutive Act.

⁹³⁴ For a list of African leaders of state visit:

http://www.africa-union/root/au/memberstates/Heads_States_and_Government; accessed 22 May 2011.

⁹³⁵ Art 9 AU Constitutive Act.

⁹³⁶ Ibid, art 23 (2). These include denial of transport and communication links with other member states, and other measures of a political and economic nature to be determined by the Assembly.

⁹³⁷ Babatunde (n 919) above.

⁹³⁸ See <http://www.awpa.org/programmes/institutional-programmes/pap>; accessed 16 May 2011.

the continent. In the words of Article 11 of the Protocol establishing PAP,⁹³⁹ it shall be vested with legislative powers and shall exercise advisory and consultative powers only over matters pertaining to: harmonisation or co-ordination of the laws of member states; co-ordination and harmonisation of policies, measures, programmes and activities of RIAs and the parliamentary fora of Africa; good governance and the rule of law; consolidation of democratic institutions; respect of human rights; attainment of the AU objectives and challenges facing the integration process in Africa as well as strategies for dealing with them; and adoption of its own rules and procedures.

The problem with the advisory and consultative functions of PAP is that they are not mandatory. It means that the other organs of the AU are not obliged to consult with or seek the input of PAP. Clearly, there is consensus towards conferring legislative powers on PAP.⁹⁴⁰ Despite valiant efforts towards the transformation of PAP, Mpanyane thinks otherwise, and according to him,⁹⁴¹ PAP should not be vested with significant legislative powers in the short run and possibly even in the medium term,⁹⁴² until it addresses the challenges it faces, the highlights of which include:⁹⁴³

- lack of capacity to enforce its decisions and to follow up on the implementation of its decisions (resolutions and recommendations);
- weak institutional capacity, relating to the lack of independent financial resources and lack of control over its budget;
- nomination instead of direct election; and
- lack of legislative power due to lack of political will.

In addressing the challenges facing PAP, Mpanyane suggests an increase in the powers of PAP in order to increase its autonomy.⁹⁴⁴ What must be learnt from the East

⁹³⁹ 22 March 2001 (hereinafter referred to as PAP Protocol).

⁹⁴⁰ Art 2 (3) read with art 11 *PAP Protocol* and art 6(f) (iv) and 14(2) AEC treaty. The whole idea of vesting the PAP with legislative power is strongly supported.

⁹⁴¹ Mpanyane "Transformation of the pan-African parliament: A path to a legislative body?" 2009 *Institute for Security Studies (ISS)* 4.

⁹⁴² *Ibid*, 9.

⁹⁴³ *Ibid*, 4.

⁹⁴⁴ *Ibid*,1.

African Legislative Assembly (EALA) is that vesting of power does not guarantee an effective parliament.⁹⁴⁵ Therefore, the vesting of power is not so much the issue, rather the willingness and readiness of the African states to comply with its decisions. If the decisions of PAP are to have binding effect, its functions must be made mandatory and its decisions authoritative, the advantage of which would be closer cooperation between PAP and the AU's decision-making organs. It is submitted that the legitimacy of PAP can only be guaranteed when members are directly appointed by the African people, rather than being selected by governments.⁹⁴⁶ The concept of "legitimacy" is of prime importance in political reflection, thus it is imperative to provide some meaning to the concept. One attempt to define legitimacy was made by Friedrich who stated that "the question of legitimacy' is the 'question of fact' whether a given rulership is believed to be based on good title by most men subject to it".⁹⁴⁷ From his definition, the following striking qualities are highlighted: rulership, belief, title, and subject to it.⁹⁴⁸ The meaning of these phrases is fairly simple.

- "rulership", according to Friedrich, includes both the types of government and the specific individuals exercising political power;
- "believed to be based" is concerned with the opinions or feelings of men, and not for instance, with what men ought to think, or with any quasi-platonic form of truth;
- "by most men" indicates that the feeling of the majority is the determining factor';
- "subject to it" asserts that only those persons subject to the rulership are to be considered; and

⁹⁴⁵ EALA was created in 1991 but only became operational in 2007. It is the only regional parliament with some legislative and supervisory powers.

⁹⁴⁶ Mpanyane 2009 *ISS 11* (hereinafter referred to as Mpanyane). See also Hugo *The unity of Europe: Political, social and economic forces 1950-1957* (1958) 8-9.

⁹⁴⁷ Friedrich *Man and his Government: An empirical theory of politics* (1963) 234.

⁹⁴⁸ *Ibid.*

- “title” is the reason for, or justification of the ruler’s ascension and continuation in rulership.⁹⁴⁹

The question that remains is what makes a leader legitimate? Is it the nomination/ election process or the rulership of a leader? Theoretically, through direct elections, the interests of the people are linked to the integration process and their sovereign rights promoted and preserved; in practice, however, one would find the complete opposite. For selfish reasons, some African leaders have not only promoted personal interest, they have also prolonged their stay in power. We find the examples of inter alia Zimbabwe and Cameroon. In the author’s opinion, direct election is only a way to ensure that the local people participate in the activities of a country or organisation, but it does not legitimise a government or institution. In other words, direct election alone cannot guarantee the legitimacy of a government or PAP.⁹⁵⁰ Thus, the focus should not be on the nomination/election process, but rather on ensuring that the parliamentarians act in accordance with the rules in place (rule of law).

The Court of Justice is to be merged with the African Court on Human and Peoples’ Rights into what is known as the African Court of Justice and Human Rights (ACJHR).⁹⁵¹ The one advantage of the ACJHR relates to the fact that it will prevent the Court of Justice and the African Court on Human and People’s Rights (ACHPR) from working at cross-purposes or encroaching on each other’s jurisdiction.⁹⁵² The ACJHR is not yet operational and will enter into force once ratified by 15 states. The fact that fewer states have ratified the ACJHR Protocol indicates the lack of political will on the part of African states. When the ACJHR comes into existence, it will consist of 16 judges, eight of whom will be responsible for the general affairs section, and eight for the human rights section.⁹⁵³ In accordance with Articles 28 and 53 of the protocol, the court is empowered to act in both a judicatory and an advisory capacity. In its advisory capacity, the court may at the request of any of the organs of the AU or outside the AU

⁹⁴⁹ Stillman “Concept of legitimacy” 1974 *Palgrave Macmillan Journal* 34.

⁹⁵⁰ Friedrich (1963) 234 (hereinafter referred to as Friedrich).

⁹⁵¹ See art 2 Protocol on the Statute of the ACJHR 1 July 2008 (hereinafter referred to as ACJHR Protocol).

⁹⁵² See Institute for Human rights and Development in Africa available at:

<http://www.ihrda.org/Africa-court-of-justice-and-human-rights-acjhr/>; accessed 16 May 2011).

⁹⁵³ Arts 16-17 ACJHR Protocol.

and upon the authority of the Assembly, give its advisory opinion on any legal question.⁹⁵⁴

In essence, state parties to the protocol and individuals are not entitled to request an advisory opinion. According to Fritz, “a decision along these lines...constitutes a fatal blow to the rule of law. It puts human rights in jeopardy, as well as future trade and investment, and long-term economic growth”.⁹⁵⁵ Analysts such as Odinkalu and Mbelle think the African governments can still do something to improve the current state of affairs.⁹⁵⁶ According to them, individuals and Non-Governmental Organisations (NGOs) should be granted automatic access.⁹⁵⁷ Building on Articles 5 and 34(6) of the protocol establishing the ACHPR,⁹⁵⁸ individuals and NGOs should be allowed to bring a complaint before the ACJHR against their state or a party to the protocol, only after exhaustion of local remedies. In its judicatory capacity, the court has jurisdiction over legal disputes relating to inter alia.⁹⁵⁹

- the interpretation and application of the Constitutive Act, AU treaties and all subsidiary instruments;
- questions of international law; and
- any legal instrument relating to human rights ratified by the state parties concerned.

The ACJHR obtains jurisdiction through a written application addressed to the registrar⁹⁶⁰ who shall forthwith give notice of the application to the parties concerned.⁹⁶¹ Pending the final decision on the case, the court may grant any provisional measure

⁹⁵⁴ Ibid, art 53.

⁹⁵⁵ Cited in Bell ‘SADC Tribunal review upholds land grab judgment’ *The Independent Voice of Zimbabwe* 1.

⁹⁵⁶ Odinkalu and Mbelle 2008 <http://www.allafrica.com/stories/200806240710.html> at 1 (hereinafter referred to as Odinkalu and Mbelle).

⁹⁵⁷ Ibid.

⁹⁵⁸ Adopted 27 June 1981, OAU Dec.CAB/LEG/67/3 rev.5,21 I.I.M 58,1982.

⁹⁵⁹ Art 28 ACJHR Protocol.

⁹⁶⁰ Ibid, arts 33-34.

⁹⁶¹ The hearing is done in public unless the court on its own motion or an application by the parties decides otherwise; *ibid*, art 39.

that it deems necessary for the preservation of the rights of the parties.⁹⁶² The court adopts decisions by majority vote and decisions are final and binding on the parties to the dispute.⁹⁶³ The Constitutive Act is silent on the legal status (nature and effect) of the ACJHR decisions on the member states.

The AU Commission is the designated engine-room cum executive arm or secretariat of the AU.⁹⁶⁴ It is headed by a chairperson and commissioners dealing with different policy areas: peace and security; political affairs; trade and industry; infrastructure and energy; social affairs; rural economy and agriculture; human resource, science and technology; and economic affairs.⁹⁶⁵ Efforts have been made to transform the Commission into an effective supranational entity.⁹⁶⁶ A notable effort was the strategic plan of the AU 2004-2007,⁹⁶⁷ which identified three components of institutional transformation of the Commission. The components yet to be fully realised are:

- institutional strengthening: entails improving the staff position of the organ and recruitment of skilled personnel with the aim to equip the organ with the necessary skills;
- rationalisation of the institutional architecture: looks at the relationship between the commission and other relevant stakeholders such as RECs, NEPAD and other AU organs; and
- refinement of the governance process: focuses on the need to create an open, transparent, and a successful governance process.⁹⁶⁸

The Permanent Representative Committee consists of permanent representatives of member states and serves as the secretariat of the Executive Council. In this regard, it prepares the work of the Executive Council.⁹⁶⁹

⁹⁶² Ibid, art 35.

⁹⁶³ Ibid, arts 42 and 46.

⁹⁶⁴ See the Second African-India Forum Summit on “Shared partnership: Shared vision” held in Addis Ababa 24-25 May 2001 available at: <http://www.au.int/en/comission>; accessed 24 May 2011.

⁹⁶⁵ Ibid.

⁹⁶⁶ Oppong (n 931) above.

⁹⁶⁷ The Commission Strategic Plan (2004-2007) 17.

⁹⁶⁸ Ibid, 38-41.

⁹⁶⁹ Art 21 AU Constitutive Act.

The Specialised Technical Committees are made up of African ministers who are responsible for the preparation of AU projects and programmes and to submit them to the Executive Council. They have not yet been established, but a decision was taken in 2009 to configure them into a set of 14 rather than the seven proposed by the Constitutive Act.⁹⁷⁰

The Economic, Social, and Cultural Council is an advisory organ aimed at ensuring the participation of the peoples of Africa in the AU process. It is composed of civil society organisations such as Solidarity for African Women's Rights.⁹⁷¹

The Financial Institutions include the African central, monetary, and investment banks. These institutions have not been created, but discussions are underway with a view to establishing them.⁹⁷²

Another allusion of supranationalism is the nature and effect of the decisions of AEC institutions on member states. The AEC treaty indicates the decision-making organs and specifies the types of legal instruments that can be adopted, their nature, and effects on the member states. Articles 98 (1) and 99 of the AEC treaty establish the AEC, its treaty, protocols and institutions⁹⁷³ as integral parts of the AU. This implies that the functions of the AEC institutions will be performed by the AU institutions, a step which the author endorses because it avoids confusion and potential conflict of jurisdictions.

The fusion of the institutions of AEC into the AU has been the subject of criticism by scholars. According to Ngong'ola,⁹⁷⁴ "the organs of the AU are political in nature and as such cannot handle technical responsibilities that the AEC treaty might require". It

⁹⁷⁰ Chitiga and Manby *Strengthening popular participation in the African Union: A guide to AU structures and processes* (Open Society Initiative for Southern Africa (OSISA and Oxfam 2009) 33.

⁹⁷¹ Ibid, 49.

⁹⁷² Ibid, 34.

⁹⁷³ Ibid, art 7.

⁹⁷⁴ See Ngong'Ola "Regional integration and trade liberalisation in Africa: The treaty for the establishment of an African economic community revisited in the context of the WTO system" 1999 *Journal of World Trade* 145-150.

cannot be denied that the political functions of the AU will be exercised without any bother, but it would be complex and even difficult for the organs of the AU to enforce the economic powers of the AEC. According to Asante,⁹⁷⁵ the fusion of institutions has been the “loss of identity of the AEC”. In his view, the AEC requires a distinct and separate institutional arrangement, which, in the author’s view, defeats the very essence of integration and uniformity. A closer look at the functions of the decision-making institutions reveals an intention on the part of the drafters of the AEC treaty to confer some degree of supranationalism on these institutions.⁹⁷⁶ Insofar as law-making is concerned, it is reserved for AEC institutions, such as the Assembly, the Council and the Court of Justice of the Community.

The Assembly acts with decisions which are not only binding on member states and organs of the community, as well as RECs, but also directly enforceable 30 days after the date of their signature by the chairperson of the Assembly.⁹⁷⁷ Like the Assembly, the Council makes regulations that are binding on members, subordinate organs of the community, and RECs, and are directly enforceable 30 days after the date of their signature by the chairperson of the Council.⁹⁷⁸ Likewise, the Court of Justice of the community takes decisions that are binding on the member states and organs of the community.⁹⁷⁹ Unlike the Assembly and Council, the decisions of the Court do not have a direct effect on the member states. Of importance is the fact that these institutions ensure uniformity in the interpretation of the international law applicable to the community.⁹⁸⁰

In summary, the harmonisation of laws is one of the objectives of the AU, and RECs are expected to co-ordinate and harmonise their policies for the gradual attainment of the AU’s objectives. It is in this context that the three RECs namely, COMESA, EAC, and

⁹⁷⁵ Asante “Towards an African economic community” 2001 *African Institute of South Africa* 16. See also Oppong (n 931) 97.

⁹⁷⁶ Babatunde (n 371) above.

⁹⁷⁷ Art 10 (1)-3 AEC treaty.

⁹⁷⁸ Ibid, art 13 (1) – (3).

⁹⁷⁹ Ibid, art 19 (1).

⁹⁸⁰ Zenda *The SADC Tribunal and the judicial settlement of international disputes* 522 (hereinafter referred to Zenda).

the SADC saw the need to initiate a process of co-ordination and harmonisation of their regional integration programmes. As earlier mentioned, the AU is an inter-governmental organisation but there are strong indications by the drafters of the AU Constitutive Act and the AEC treaty of the intention to tread a supranational path. With these, one can safely argue that there are efforts by existing RECs to harmonise their policies and the intention to create a supranational AU.

Since there is the intention on the part of the drafters, the transformation of the AU into a supranational entity will require in addition the vesting of more powers on the common institutions through the transfer of a substantial portion of states' sovereignty to the AU's neutral and technocratic common institutions. This of course may take months or even years. The corollary of this transfer is that the common institutions will be empowered to take decisions that are supreme and directly affect member states. Bequeathing such institutions with the required powers is pertinent and therefore African leaders must take the lead.

6.2.2 *Harmonisation of laws within sub-regional economic communities (RECs)*

Africa registers 14 regional organisations, eight of which are regarded as the building blocks towards continental integration- the Arab Maghreb (AMU); the Community of Sahel-Saharan States (CENSAD); COMESA; EAC; ECCAS; ECOWAS; the Inter-governmental Authority on Development (IGAD) and SADC.⁹⁸¹ Although an examination of the RECs is important for the improvement of the SADC, an attempt is made to determine priorities between them.

6.2.2.1 *The East African Community (EAC)*

The EAC is a regional inter-governmental organisation consisting of Burundi, Kenya, Rwanda, Tanzania, and Uganda. EAC is set to increase by three of the new applicants South Sudan, Somalia and DRC finally joined. Regional integration in the case of the

⁹⁸¹ Babatunde (n 371) above. In 2006, the Assembly of Heads of State and Government of the African Union (Assembly) suspended the recognition of new regional economic communities (RECs). See AU, Decision on the Moratorium on the Recognition of Regional Economic Communities, Assembly/AU/Dec.112 (VII) 2006 (hereinafter referred to as the RECs Moratorium Decision).

EAC is premised on the common history, culture, language, political ties, and a longstanding commitment to co-operate in the broad range of political, social, economic, and cultural programmes.⁹⁸² It is also premised on the desire of the governments to improve the standard of living of the people, by adopting a united front in their dealings with one another.⁹⁸³ The treaty establishing the EAC was first signed in 1967, but did not function properly and was revived in 1999 with the adoption of a new treaty⁹⁸⁴ that came into force in 2000.⁹⁸⁵ The treaty outlines the objectives, principles, and areas of co-operation and also specifies the stages of the EAC integration process.⁹⁸⁶

In accordance with Article 5 (2) of the EAC treaty, the EAC stages of integration commences with a customs union, which came into force in 2010.⁹⁸⁷ The second stage is the common market,⁹⁸⁸ which came into force in 2010⁹⁸⁹ and allows for free movement of goods, services, capital, persons, and the rights of residence and establishment.⁹⁹⁰ The common market was designed “to facilitate the complete removal of barriers in order to improve market access and create an open trade, investment, and market space”.⁹⁹¹ Within the common market context, the EAC has made substantial achievements. Firstly, it has facilitated the free movement of people through the introduction of the EAC passport, the adoption of a single immigration entry-arrival/departure cards, removal of visa requirements, and harmonisation of the procedures for issuance of work/residence permits.⁹⁹² However, a yellow card is required before entry in Tanzania, and migrant workers are expected to obtain a work visa.

⁹⁸² Nyamajeje “Regional Integration: Perspective, challenges and initiatives” 2 (hereinafter referred to as Nyamajeje).

⁹⁸³ Ibid.

⁹⁸⁴ The for the establishment of the East African Community (EAC) 2000 (hereinafter referred to as EAC treaty). Available at: www.eac.int.

⁹⁸⁵ Eborah and Tanoh (eds) *Compendium of African sub-regional human rights documents* (2010) 37.

⁹⁸⁶ Ibid, art 5 (2).

⁹⁸⁷ 1 January 2010.

⁹⁸⁸ Art 76 EAC imposes on EAC a duty to establish a common market that will allow for the free movement of goods, services, its people and that will guarantee to the people their rights of establishment and residence within the community.

⁹⁸⁹ 1 July 2010.

⁹⁹⁰ Art 104 EAC treaty provides for the free movement of persons, labour, services, and rights of residence and establishment of the citizens of the community.

⁹⁹¹ Nyamajeje (n 982) 5.

⁹⁹² Ibid, 6.

Secondly, the EAC has undertaken a number of initiatives aimed at the facilitation of migrant workers in the region. This is in accordance with the mandate accorded it under Article 10 of the treaty provides for the free movement of workers within the region, including the rights to accept employment, freedom of association and collective bargaining, and to enjoy the rights and benefits of social security accorded to the nationals.⁹⁹³ Despite all efforts, non-tariff barriers have continued to hinder the integration process in the community, and raised the cost of doing business in the region.⁹⁹⁴ At a workshop conducted by the EALA Committee on Communications, Trade and Investment,⁹⁹⁵ Ndahiro, chairperson of the Committee, pointed to an increase in non-tariff barriers, such as weighbridges from five to eight between Dar es Salaam and Rusumo, the border with the Republic of Rwanda, police checks, and roadblocks.⁹⁹⁶ He also acknowledged efforts made towards reducing non-tariff barriers, the progress registered at the border posts that operate on a 24-hour basis, and the launch of the Electronic Single Window System created to reduce bureaucracy.⁹⁹⁷

The third stage is the monetary union, which was expected to be accomplished in 2012. Negotiations are still underway towards the creation of a monetary union to facilitate commercial transactions and the ultimate stage is the political federation, which is expected to be achieved in 2015. As a political federation, partner states of the EAC will be required to cede sovereignty over economic, social, and even political policies to a supranational authority.⁹⁹⁸

Harmonisation of commercial laws forms an integral part of the EAC agenda. The EAC Development Strategy 2006-2010 stipulates harmonisation of laws as a key strategic intervention. Accordingly, partner states are required to harmonise their laws.⁹⁹⁹ The EAC Common Market Protocol specifically obliges partner states to “approximate their

⁹⁹³ Art 10 (11) (a) - (e) EAC treaty.

⁹⁹⁴ TMSA ‘Report of the workshop on non-tariff barriers in the EAC region’ (<http://trademarksa.org/news/report-workshop-non-tariff-barrier-eac-region>; accessed 26 June 2012).

⁹⁹⁵ The workshop was conducted on 25-27 March 2012.

⁹⁹⁶ Ibid.

⁹⁹⁷ Ibid.

⁹⁹⁸ Ibid.

⁹⁹⁹ Art 126 (2) EAC treaty.

national laws and to harmonise their policies and systems, for the purposes of implementing this Protocol".¹⁰⁰⁰ Within this context, measurable attempts have been made to harmonise the national laws pertaining to the community. Firstly, a sub-committee on the Approximation of Laws in the EAC Context has been established and studies and reviews the laws of the partner states with the aim of identifying gaps, differences, and similarities in the laws, and to make recommendations.¹⁰⁰¹ The Committee has so far reviewed laws governing:¹⁰⁰²

- companies;
- insolvency;
- partnerships; and
- business names registration.

The following areas of law have been identified as a priority for harmonisation and their bills are in the offing: intellectual property law; contract law; public private partnership law; the law of the recognition of judgements; business registration; and the law related to enforcement measures and procedures for debt recovery.¹⁰⁰³ The EAC trade unions have demanded the harmonisation of existing immigration, employment, and labour laws in the community, all of which are critical to the implementation of the EAC Common Market.¹⁰⁰⁴ Secondly, the Task force on Approximation of National Laws had in September 2010 studied the national laws governing employment and labour to identify and consider the conflicts and areas of divergence.¹⁰⁰⁵ The laws are yet to be harmonised. The different legal systems¹⁰⁰⁶ and financial constraints have largely affected the ability of the EAC countries to harmonise their commercial laws.¹⁰⁰⁷

¹⁰⁰⁰ Arts 47 Common Market Protocol 1 July 2010.

¹⁰⁰¹ Agaba 'Regional harmonisation of commercial laws: Opportunities and implementation challenges' 3-4 (http://networkofreformers.files.wordpress.com/2011/02/steven-agaba-regional-harmonisation-of-commercial-laws-opportunities-and-implementation-challenges_detailed.pdf; accessed 18 April 2011) (hereinafter referred to as Agaba).

¹⁰⁰² Ibid.

¹⁰⁰³ Ibid, 6.

¹⁰⁰⁴ See <http://africabusiness.com/2010/08/23/eac-calls-for-harmonisation-of-labour-laws>; accessed 17 April 2012.

¹⁰⁰⁵ Ibid.

¹⁰⁰⁶ The legal divide in the community is between the common law systems of Uganda, Tanzania and

The EAC functions through several organs and institutions established under Article 9 of the treaty. They include the Summit, the Council of Ministers which is the decision-making organ,¹⁰⁰⁸ the Sectoral Committee, the Co-ordination Committee, Secretariat, the EACJ, and the EALA. The EALA adopts community laws. Article 8 (4) of the treaty affirms the supremacy of community laws over national laws. This provision ties the hands of partner states, for, even in the future, they cannot legislate a law contrary to community law. The EACJ has a broad jurisdiction that covers trade, investment, and other related matters.¹⁰⁰⁹ The court is empowered to hear and determine any matter relating to interpretation and application of the treaty establishing EAC, industrial disputes, arbitration, and preliminary ruling. It is also empowered to hear disputes relating to the breach of a provision of the treaty or obligations under the treaty.¹⁰¹⁰ Unlike the SADC, where the ultimate enforcement of the SADC laws is left to the highest political organ (the Summit),¹⁰¹¹ judicial enforcement¹⁰¹² and enforcement of the EAC laws are in the hands of the EACJ.

6.2.2.2 *Common Market for Eastern and Southern Africa (COMESA)*

COMESA is an all-embracing development organisation involving co-operation in all economic and social sectors. Regional integration in COMESA is premised on the desire of the governments to improve the standard of living of the people. In pursuing this goal, COMESA member states have agreed to co-operate in the exploitation of human and natural resources and to adhere to, among other things, the following

Kenya, the civil law system of Burundi and the mixed legal system in Rwanda (civil and common law systems).

¹⁰⁰⁷ Agaba (n 1000) 9 and 10.

¹⁰⁰⁸ Arts 14 EAC treaty.

¹⁰⁰⁹ Draft Protocol on the extension of the Jurisdiction of EAC Court of Justice 4 May 2005 (http://www.ktuochatatiba.org/index2.php?option=com_docman&task=doc_view&gid=Itemid=36; accessed 18 April 2012) (hereinafter referred to as the EAC Draft Protocol).

¹⁰¹⁰ Art 28 (1) EAC treaty provides:

- “(1) A Partner State which considers that another Partner State or an organ or institution of the Community has failed to fulfill an obligation under this Treaty or has infringed a provision of this Treaty, may refer the matter to the Court for adjudication.
- (2) A Partner State may refer for determination by the Court, the legality of any Act , regulation, directive, decision or action on the ground that it is ultra vires or unlawful or an infringement of the provisions of this Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power.”

¹⁰¹¹ Art 33 SADC Protocol on the Tribunal 2000.

¹⁰¹² Arts 27 and 28 EAC Draft Protocol.

principles: equality and inter-independence of the member states; solidarity and collective self-reliance among the member states; inter-state co-operation and harmonisation of policies; and integration of programmes among member states to the extent required for the proper functioning of the common market.¹⁰¹³ Strides have been made to harmonise the product and policy standards in various sectors.¹⁰¹⁴ The member states have also agreed to create and maintain:¹⁰¹⁵

- an FTA (was to be attained in 2000) that guarantees the free movement of goods, services produced within COMESA, and the removal of all tariff and non-tariff barriers. It is not yet in force because the agreement has not been signed by all members;
- a customs union (was to be attained in 2008) under which goods and services imported from non-COMESA countries will attract an agreed single tariff by all COMESA states. It is also not yet in force because the agreement has not been signed by all members;
- to guarantee free movement of capital and investment;
- the establishment of a common monetary union with common currency; and
- the adoption of a visa arrangement, including the right of establishment.

In terms of its achievements, COMESA has helped to reduce customs barriers and facilitate trade,¹⁰¹⁶ and has adopted a five-year business plan framework and some basic rules and procedures.¹⁰¹⁷ COMESA functions through the Authority of Heads of State and Government, the Council of Ministers, the Committee of Governors of Central Banks and a court of justice¹⁰¹⁸ that is responsible for the development of the common market. Unlike other regional courts, it is only open to public authorities and

¹⁰¹³ Mancuso (n 2) above.

¹⁰¹⁴ Draper *et al* 'SACU, Regional Integration and the overlap issue in Southern Africa: From Spaghetti to Connelloni' Trade Policy Report (2007) 11 (hereinafter referred to as Draper *et al*), available at http://sarpn.org/documents/d0002411/SACU_SAIIA_Jan2007.pdf.

¹⁰¹⁵ See <http://www.actrav.itscilo.org/actrav-english/telearn/global/ilo/blokit/comesa.htm>; accessed 18 April 2012.

¹⁰¹⁶ *Ibid.*

¹⁰¹⁷ *Ibid.*

¹⁰¹⁸ Art 7 (1) COMESA treaty 1993.

governments, as opposed to private litigants. Natural persons residing in any of the member state may approach the court only after exhaustion of local remedies in the national courts or Tribunal of the member states.¹⁰¹⁹ Like EAC, the COMESA treaty avails member states with the right to refer to the court for adjudication in matters relating to infringement of a provision or obligation of the treaty by a member state.¹⁰²⁰ It also specifies the type of legal instrument to be adopted, and their nature in the member states. The decisions of the Authority and the regulation of the Council are binding on the member states,¹⁰²¹ while the directives of the Council are only binding as to the result to be achieved.¹⁰²² Compared to OHADA and the EAC, COMESA still lags in its attempt to harmonise the laws, programmes, and policies of its member states, and this is attributed to the greater diversity in the region.¹⁰²³

6.2.2.3 Economic Community of West African States (ECOWAS)

ECOWAS is a regional group of 15 African states nine of which are the OHADA member states. It was established in 1975 with the view to promoting economic co-operation and integration, as a means of stimulating economic growth and development.¹⁰²⁴ It could be observed that the treaty adopts the classical model of economic integration, envisaging the establishment of an economic community through a gradual process of tariff elimination leading to the establishment of an FTA, a customs union and a common market.¹⁰²⁵ Since its inception in 1975, ECOWAS has tried to promote regional integration and development through the promotion of intra-regional trade, mobility of labour through free movement of persons and goods, harmonisation of laws, and the establishment of a regional monetary system.¹⁰²⁶

¹⁰¹⁹ Ibid, art 26.

¹⁰²⁰ Ibid, art 24 (1) which provides: "A Member State which considers that another Member State or the Council has failed to fulfill an obligation under this Treaty or has infringed a provision of this Treaty, may refer the matter to the Court."

¹⁰²¹ Ibid, arts 8 (3), 10(2) and 29 (2).

¹⁰²² Ibid, art 10 (3).

¹⁰²³ Mancuso (n 558) 12.

¹⁰²⁴ Art 3 ECOWAS treaty 1975 as amended by the Revised treaty 1993 (ECOWAS treaty).

¹⁰²⁵ Ibid, art 3 (1). See Nnanna "Economic and monetary integration in Africa" 14 (hereinafter referred to as Nnanna).

¹⁰²⁶ Martor *et al* (n 91)296.

Harmonisation of laws is a treaty requirement. The treaty sets out the objectives of the community as being “to promote co-operation and integration” aimed at improving the living standards of its people, and to maintain and enhance economic stability, foster relations among member states, and contribute to the progress and development of the African continent.¹⁰²⁷ In pursuing its objectives, the community will ensure the harmonisation and co-ordination of national policies and the promotion of integration programmes, projects and activities, particularly in food, agriculture and natural resources, industry, transport and communications, energy, trade, money and finance, taxation, economic reform policies, human resources, education, information, culture, science, technology, services, health, tourism, and legal measures.¹⁰²⁸ A committee of eminent persons on the harmonisation of commercial laws in ECOWAS is in place. The establishment of such committee was in response to the call for the harmonisation of the laws of ECOWAS countries.¹⁰²⁹

The importance of ECOWAS lies in the fact that it provides the forum in which to expand the OHADA process of harmonisation. Thus, there are good arguments for common law countries of ECOWAS to join OHADA. Firstly, it is because they are surrounded by francophone countries. If they join, cross-border investment between them will be facilitated and ultimately aid the objectives of OHADA and ECOWAS.¹⁰³⁰ It will also facilitate the realisation of the regional pipeline project between Benin, Ghana, Nigeria, and Togo, as well as the creation of the power pool among ECOWAS members.¹⁰³¹ The free movement of persons is considered a key component towards the economic growth of the community. As a result, the ECOWAS passport was introduced in 2000. It allows for free movement of people and guarantees citizens the right of residence and establishment in any of the member states, including the right to

¹⁰²⁷ Art 3 (1) ECOWAS treaty.

¹⁰²⁸ Ibid, art 3 (2) a.

¹⁰²⁹ Ajulo “Sources of the law of the Economic Community of West African States (ECOWAS)” 2001 *African Journal of Law* 73.

¹⁰³⁰ Trinity 2009

<http://www.trinityllp.com/the-harmonisation-of-business-law-in-africa-its-impact-on-investment> at 1 ([hereinafter referred to as Trinity](#)).

¹⁰³¹ Martor *et al* (n 371) 297.

take up employment in the territory of any member states.¹⁰³² Despite this achievement, citizens continue to face administrative harrassment at border posts.

Recognising that ECOWAS no longer adequately catered for the needs of the people and the community, initiatives were mapped towards the transformation of the organisation into an effective and supranational entity. One of the initiatives is the transformation of the executive secretariat into a nine-member commission with a president, a vice-president and seven commissioners.¹⁰³³ Apart from the executive secretariat, ECOWAS operates through the Authority of Heads of State and Government, Council of Ministers, Community Parliament, the Economic and Social Council, Fund for Co-operation, Compensation, and Development, Specialised Technical Committees, and the Community Court of Justice. It is worth noting that the court is neither a court of final appeal, nor a court of cassation (*cour de cassation*), meaning that it does not have the competence to revise decisions made by domestic courts of member states.¹⁰³⁴

6.2.2.4 West African Economic and Monetary Union (UEMOA)

Determined to elevate the low degree of integration and the weak monetary co-operation of the past, the heads of state and government of Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo concluded and signed the treaty establishing UEMOA in 1994.¹⁰³⁵ Article 4 of the treaty lists five broad objectives:

- the convergence of macroeconomic policies and indicators;
- creation of a common market;
- co-ordination of sectoral policies;
- harmonisation of fiscal policies; and
- greater economic competitiveness.

¹⁰³² Art 59 (1) Revised ECOWAS treaty 1993.

¹⁰³³ See the ECOWAS Newsletter, issue 1 October 2006.

¹⁰³⁴ See *Keita and another v Republic of Mali*, Judgment ECW/CCJ/A/03/07.

¹⁰³⁵ The UEMOA treaty is available at <http://www.uemoa.int>.

UEMOA is one of the world's most far-reaching examples of monetary integration in which members share convertible currency issued by a supranational central bank that oversees the operations of an external reserve pool.¹⁰³⁶ Laverge attributes UEMOA's success to outside support provided by the French, and its supranational features,¹⁰³⁷ while Medhora attributes it to the supranationality of the Central Bank of the States of West Africa (BCEAO) over monetary policy. Articles 5 and 6 define UEMOA's basic principles; while Article 5 recognises the principle of subsidiarity, Article 6 affirms the supranational character of UEMOA over monetary matters.¹⁰³⁸

The institutional structure comprises of the Conference of Heads of State and Government, the Council of Ministers, the Court of Justice, the Commission, and BCEAO. The Council issues regulations, directives, decisions, recommendations, and opinions. Regulations are directly applicable in all the member states and override conflicting national legislations, but directives are not directly applicable. Decisions on the other hand are mandatory, but applicable only to the parties to a dispute.¹⁰³⁹ Detrimental to the efficacy of the court is the fact that individuals cannot bring complaints against member states for breaches of the treaty. Equally, the court cannot receive requests from domestic courts for the interpretation of UEMOA legislation. The BCEAO is designed to issue currency for the member states.¹⁰⁴⁰

Medhora points out the various benefits of this scheme, the most notable being that the countries have managed to maintain stable, non-inflationary monetary policies, thanks to the insulation of the BCEAO from political interference. UEMOA has also managed to guarantee to the nationals' freedom to establish in any of the member states, and to

¹⁰³⁶ Medhora "Lessons from UMOA" in LavergneR (ed) *Regional Integration and Cooperation in West Africa: A multidimensional perspective* (1997) 215.

¹⁰³⁷ Lavergne "Reflections in an agenda for regional integration and cooperation in West Africa" in *Regional Integration and Cooperation in West Africa: A multidimensional perspective* (1997) 18.

¹⁰³⁸ See http://www.idrc.ca/pan/ev-68350-201-1-DO_TOPIC.htm; accessed 31 May 2011; Kaptouom 2007 <http://www.wiwiss.fu-berlin.de/verwaltung-service/bibliothek> at 13 (hereinafter referred to as Kaptouom).

¹⁰³⁹ Martor *et al* (n 91) 287.

¹⁰⁴⁰ Ibid.

transfer funds from one member state to another.¹⁰⁴¹ Since 2000, member states share an external common tariff and a single customs territory, the results of which are exemption from customs duties for industrial and other products, local products, and handicraft originating from within the Union.¹⁰⁴²

6.2.2.5 *The Economic and Monetary Union of Central African States (CEMAC)*

CEMAC, like UEMOA, is a monetary and economic union established in 1994 by six of the OHADA member states namely Cameroon, the Central African Republic, Chad, Congo, Equatorial Guinea, and Gabon. CEMAC has adopted specific regulations¹⁰⁴³ and established permanent institutions, such as the Community Court of Justice, to ensure the implementation of community legislation; the Inter-parliamentary Commission to ensure democratic control of CEMAC's institutions; and the BCEAO to finance multinational projects and to promote socio-economic development.¹⁰⁴⁴ Unlike UEMOA, the process of integration has proceeded at a slower pace, largely because of lack of commitment on the part of the member states.¹⁰⁴⁵ A good example is the failure of the heads of states to formalise the decision taken on the abolition of visa requirements for movement of citizens between the concerned states.¹⁰⁴⁶ The lack of commitment on the part of African leaders and others factors have largely contributed to the slowdown or failure of integration, co-operation, and harmonisation attempts in Africa.

6.2.3 *Factors hindering the maximal realisation of integration attempts in Africa*

For a continent where there is high regard for power, it is not uncommon to find failed RIAs, and the question is why? The sections below present a summary of the reasons behind the failure of RIAs in Africa.

¹⁰⁴¹ See Council of Ministers Regulation 9 of 20 December 1998.

¹⁰⁴² Martor *et al* (n 91)288.

¹⁰⁴³ Regulation 1/99/UEAC-CM-639 of 5 June 1999 governs anti-competitive practices in CEMAC.

¹⁰⁴⁴ Martor *et al*(n 91) 292-295.

¹⁰⁴⁵ Abeng 2009 www.ohada.com/fichiers/newsletters/622/newsletter-ABAA.pdf at 12-14 (hereinafter referred to as Abeng). Nonetheless, efforts are underway to formalise the decision on the abolition of visa requirements. <http://www.en.legabon.org/news/1365/president-ali-bongo-ondimba-s-speech-5th-cemac-day>; accessed 15 June 2013).

¹⁰⁴⁶ *Ibid.* There are plans to formalise by January 2014 the decision taken on the abolition of visa requirements for movement of citizens between the concerned states.

6.2.3.1 *Overlapping membership*

As is evident from the preceding discussion, Africa is home to several RIAs, which according to Gathii is a classic case of the spaghetti bowl.¹⁰⁴⁷ Several African countries belong to two or more RIAs and the ECA identified a number of reasons why African countries join more than one RIA; the highlights of which include:¹⁰⁴⁸

- cultural, economic and political reasons;
- historical reasons;
- political pressure; and
- need for additional resources.

Gathii points out the various benefits of overlapping membership. Of prime importance is it gives landlocked countries access to aquatic trade routes that would otherwise be unavailable to them. Another benefit is what Gathii referred to as “regime shifting”, which is the ability to shift law-making initiatives from one international venue to another.¹⁰⁴⁹ This illustrates the flexibility or open-door membership RIAs offer. In spite of these benefits, some scholars think differently. For Gathii, overlapping membership saps the little trade capacity and budgets of African governments and prevents them from focusing on a single regional economic bloc.¹⁰⁵⁰ There is no firm proof to refute dual membership, but after inspection it raises a number of issues. It gives rise to different rules, results in duplication of structures and efforts, and incurs multiple costs for membership contributions and negotiations.¹⁰⁵¹ It also results in forum shopping. For instance, given that Zambia is a member of the SADC and COMESA, in the event of a dispute, it has the choice to take the matter to either of the judicial bodies.¹⁰⁵²

¹⁰⁴⁷ Gathii “African Regional trade agreements as flexible legal regimes” 6-8 (2011, unpublished and on file with author) (hereinafter referred to as Gathii).

¹⁰⁴⁸ Babatunde (n 930) 108.

¹⁰⁴⁹ Gathii (n 1047) above.

¹⁰⁵⁰ Ibid.

¹⁰⁵¹ Babatunde (n 931) 105.

¹⁰⁵² Luwam “Comparative market for Eastern and Southern African Countries: Municipality of membership issues and choices” 2010 *African Journal of International and Comparative Law (Afr.J.Int’CL)* 222.

The cost of sustaining two or more regional bodies makes it difficult for members to meet their contribution and obligations to the various RIAs,¹⁰⁵³ the consequences of which are low implementation of their programmes.¹⁰⁵⁴ Each of the RIAs comes with its own benefits, but the problem is that they are not coordinated. Accordingly, what is more appropriate at this point in time is Article 88 (1) of the AEC treaty, which provides for “coordination, harmonisation and progressive integration of the different RIAs”. Fortunately, at the second and third conferences of the African ministers of integration held in Kigali and in Abidjan respectively,¹⁰⁵⁵ the need to formulate a Minimum Integration Plan (MIP) was recognised. The MIP entered into force in 2007 through a study titled the “Rationalisation of the Regional Economic Communities (RECs): Revision of the [AEC] Treaty and Adoption of the Minimum Integration Programme”, performed by the AU Commission. Briefly, the MIP is designed to serve as a connecting link between the different RECs in accelerating the establishment of the AEC.¹⁰⁵⁶ MIP goals are yet to be implemented.

6.2.3.2 *Differences in the size and level of economic development of African countries*

The differences in the size and level of development of African countries stand out as the most important impediment to regional integration schemes in Africa. Generally, where there are substantial differences between countries in a regional scheme, there is the possibility of smaller countries either pulling out or committing half-heartedly, for fear of losing out to the bigger countries. When the smaller countries decide to commit, the question of unequal benefits that accrue from integration is raised.¹⁰⁵⁷ The small size of most African countries is one of the reasons why they should be integrated, in order to meet up with the challenges of the globalising world. When this happens, a balance should be struck in the distribution of integration benefits between the smaller countries and larger ones. Interestingly, some RIAs have come up with mechanisms to adjust the benefits and burdens arising from integration. ECOWAS for instance has a protocol in

¹⁰⁵³ ECA 2006 (n 788) XVII.

¹⁰⁵⁴ Ibid.

¹⁰⁵⁵ Kigali July 2007 and Abidjan May 2008.

¹⁰⁵⁶ Kossi *et al* *Minimum integration programme* (African Union Commission- Economic Affairs Department 2010) 14 -16.

¹⁰⁵⁷ Babatunde (n 1051) above.

place that relates to a fund for co-operation, compensation, and development of ECOWAS.¹⁰⁵⁸

The EAC uses the principle of variable geometry that is [those] situations where subgroups of members ... wish to pursue deeper and more intensive forms of integration and cooperation on specific issues, while other members wish to remain outside these initiatives on a permanent basis.¹⁰⁵⁹ Following a request to the EACJ for an advisory opinion on whether the principle of variable geometry can be applied to guide the integration process, the Court held that: “the principle provides an exit route within the treaty framework for states that are suspicious [that] they will be economically disadvantaged by relatively more economically powerful states”.¹⁰⁶⁰ The principle gives countries the opportunity to opt out of commitments they do not agree to. Because the EAC does not create a spirit of unity, the ECOWAS framework should be largely adopted or copied by organisations that wish to succeed.

6.2.3.3 *Lack of funds*

Lack of funds is another reason behind the failure of RIAs in Africa. The Economic Community of Central African States (ECCAS) is a classical case. ECCAS has remained inactive since 1992 due to insufficient financial resources.¹⁰⁶¹ It is argued that insufficient funds, coupled with countries’ obligations to pay annual dues to various sub-regional organisations, largely contribute to the failure of integration schemes in Africa.¹⁰⁶² It is not to say that Africa does not have the means, but that the officials in charge of projects do not have the proper skills and are corrupt.¹⁰⁶³ There is no doubt that funds are crucial to the success of integration, and efforts should be taken to address the current problems of corruption and mismanagement. In so doing, Africans may either adopt the “zero-tolerance approach” adopted by Angola, or follow China to

¹⁰⁵⁸ See <http://www.comm.ecowas.int/sec/index.php?id=ap051176fund&lang=en>; accessed 1 June 2011.

¹⁰⁵⁹ Allan (2003) 36 (hereinafter referred to as Allan).

¹⁰⁶⁰ Gathii (n 1047) 5.

¹⁰⁶¹ See www.ceeac-eccas.org; accessed 2 June 2011.

¹⁰⁶² Babatunde (n 1057) above.

¹⁰⁶³ Ibid. See Davies “Oil wealth not trickling down” *New Africa Analysis* (2010) 9.

comply with anti-corruption provisions as part of the International Monetary Fund (IMF) stand-by Agreement.¹⁰⁶⁴

6.2.3.4 *The Lack of political will (will theory)*

In the author's opinion, a lack of political will by African leaders is the greatest challenge to the success of RIAs in Africa. African leaders have recognised the need to co-operate and integrate their economies for the benefits of the people, but have failed to translate their goals and objectives into reality.¹⁰⁶⁵ Ntumha, after review of three RIAs in Africa, points to the lack of supranationality, which he qualifies as "interstate approach".¹⁰⁶⁶ According to him, the interstate approach is manifested in several ways: maintenance of national sovereignty; dominance of member states over the workings of regional institutions; and the rule of consensus.¹⁰⁶⁷ Kandin made the same remarks in his comparison of ECOWAS and CEMAC.¹⁰⁶⁸ Ntumha and Kandin attribute the lack of supranationality to the failure of the member states to cede part of their sovereignty in the design of regional institutions. What is puzzling is why African leaders will invest substantial time and effort in concluding arrangements that they are not prepared to honour. This notwithstanding, some of the African states have made considerable progress in this regard. The case of OHADA is a shining example. The member states ensured the supranationality of OHADA through cession of part of their sovereignty to OHADA.¹⁰⁶⁹ UEMOA is also a notable example.¹⁰⁷⁰

6.2.3.5 *Inadequate institutional design*

Another significant reason behind the failure of RIAs is the inadequate institutional design. An institutional design entails a workable plan with clearly defined targets,

¹⁰⁶⁴ For a detail discussion; see (<http://www.cepr.net/documents/publications/imf-2009-09.pdf>; Accessed 21 September 2011).

¹⁰⁶⁵ Thompson "Legal problems of economic integration west African sub-region" 1990 *African Journal of International and Comparative Law* 86.

¹⁰⁶⁶ Ntumha "Institutional similarities and differences: ECOWAS, ECCAS, and PTA" in LavergneR (ed) *Regional Integration and Cooperation in West Africa: A multidimensional perspective* (1997) 303-321.

¹⁰⁶⁷ *Ibid*, 331-352.

¹⁰⁶⁸ See Kandin "La faiblesse des structures institutionnelles comme frein au processus d'intégration régionale en Afrique de L'ouest" (A paper presented at the international conference on "Regional integration in West Africa" 11-15 January 1993 in Dakar, Senegal).

¹⁰⁶⁹ Arts 10, 16 and 20 OHADA treaty.

¹⁰⁷⁰ See paras 6.2.2.4 above.

negotiations with all concerned, implementation, control, and the resolution of disputes. But for various reasons, African leaders have taken these for granted, the consequence of which is the creation of intergovernmental institutions with weak secretariats, and little or no autonomy.¹⁰⁷¹ Apart from the lack of autonomy, there are insufficient enforcement mechanisms to ensure that states abide by the common rules.

In summary, there are substantial differences between the goals and achievements of most RECs in Africa. The analysis that we have just made distinctly indicates that the RECs do not only develop at a homogenous rate, but also that they are at different stages of the process of the AEC treaty. The table below clearly summarises the inconsistent development of RECs in Africa.

Table 1: Africa's Economic Communities and Current Status

Community	Member States	Objectives	Current Status
East African Community (EAC)	Burundi, Kenya, Tanzania, Rwanda and Uganda	To develop policies and programmes in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit.	Customs union and common market achieved in 2010. Monetary union (2012) and political federation (2015) not achieved.

¹⁰⁷¹ Trivedi (2005) 12 (hereinafter referred to as Trivedi).

Economic Community of West African States (ECOWAS)	Benin, Burkina Faso, Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.	Full economic union	Reduction of custom duties achieved as well as movement of designated goods and persons. Administrative harassment at border posts continues. Tariffs removed on unprocessed goods. Full elimination of tariffs on industrial goods not yet achieved. Secondary monetary zone in progress. Peace and security mechanism and macroeconomic policy convergence in place.
The West African Economic and Monetary Union (UEMOA)	Benin, Burkina Faso, Guinea, the Ivory Coast, Mali, Niger, Senegal and Togo	Full Economic and monetary Union	Stable and non-inflationary monetary policies; free transfer of funds achieved as well as free movement of nationals. Customs union achieved. Business laws harmonised and Macroeconomic policy convergence in place.
Economic and Monetary Union of Central African States (CEMAC)	Cameroon, the Central African Republic, Chad, Congo, Equatorial Guinea, and Gabon.	Full economic and monetary Union	Monetary and Customs unions achieved. Competition and business laws harmonised. Macroeconomic policy convergence in place.
The Common Market for Eastern and Southern Africa (COMESA)	Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Ethiopia, Eritrea,	Common Market	Free trade among nine members achieved in October 2000. Customs union expected by 2004, which is not yet achieved. Criteria set for

	Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.		Macroeconomic policy convergence.
Southern African Development Community (SADC)	Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Zambia, and Zimbabwe.	Full economic Union	Free trade area (2008) but not yet achieved. Custom Union (2010) postponed. Common market (2015) and monetary union (2018) are both underway. Peace and security mechanism in place. Power pool in place.
Organisation for the Harmonisation of Business Law in Africa (OHADA)	Benin, Burkina Faso, Central African Republic, Chad, Cameroon, Comoros, Congo, Equatorial Guinea, Guinea, Guinea Bissau, Gabon, Ivory Coast, Mali, Niger, Senegal and Togo.	Uniform business laws	Nine uniform Acts adopted. Five institutions created.

Sources: Economic Commission for Africa, Nnanna and the Author.

6.3 European Union experience

This section presents an overview of the EU experience. The EU is significant for the harmonisation of international commercial law because it created an environment in

which the vastly different legal systems of the community exist. It is also significant because it is the most successful harmonisation attempt in the areas of choice of law issues,¹⁰⁷² and the recognition and enforcements in civil and commercial matters.¹⁰⁷³ Most importantly, it is a supranational organisation, and a demonstration of member states' strong political commitment towards deeper integration.¹⁰⁷⁴ It is for these reasons that it must be considered as an important development in the harmonisation of commercial law and the establishment of supranational institutions.¹⁰⁷⁵

The EU is a grouping of 28 European countries namely, Austria, Belgium, Bulgaria, Croatia, Czech Republic, Cyprus, Denmark, Estonia, France, Finland, Greece, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovenia, Slovakia, Sweden, Spain, and the United Kingdom,¹⁰⁷⁶ all seeking a common social and economic policy for the development of their respective countries. Towards this end, the member states have signed a number of treaties. These include the Paris treaty,¹⁰⁷⁷ which established the European Coal and Steel Community (ECSC), the Rome treaty, which established the European Atomic Energy Community (EURATOM) and the European Economic Community (EEC). Decision-making in the EU is in the hands of supranational institutions acting above nation-state.¹⁰⁷⁸ The supranational characteristic of the EU distinguishes it from other regional organisations. Having said this, it is imperative to consider the EU harmonisation experience, the effect of the legal instruments adopted, and its institutional set-up.

¹⁰⁷² Rome Convention on the law applicable to contractual obligations 19 June 1980.

¹⁰⁷³ EC Regulation 44/2001 of 22 December 2000.

¹⁰⁷⁴ Trivedi (n 1071) 88.

¹⁰⁷⁵ *Costa v ENEL* 1964 ECR 585. See *Storm Business law in Europe* (1982) 3.

¹⁰⁷⁶ See Horvat and Štiks 2013

<http://www.theguardian.com/commentisfree/2013/jul/01/croatia-latest-member-eu-periphery>;

accessed 7 November 2013. Cuthbert *European Union law* (2009) 4.

¹⁰⁷⁷ The treaty was negotiated by France, Germany, Italy and the Benelux countries namely, Belgium, the Netherlands, Luxembourg in 1952.

¹⁰⁷⁸ Moravcsik 1991 <http://www.princeton.edu/~amoravcs/library/negotiating.pdf> at 4 (hereinafter referred to as Moravcsik).

6.3.1 *European union harmonisation experience*

In an attempt to address the issues of private international law, the EU has harmonised the national rules on jurisdiction, choice of law, and the recognition and enforcement of judgments into private international law instruments that now form part of the union law. This was with the aim to achieve uniformity in the interpretation and application of the laws and to improve the internal market.¹⁰⁷⁹ The legal instruments consist of regulations and directives, both of which form part of the union law. The difference between regulations and directives lies in the purpose for which they were created. Regulations are adopted on subjects that require harmonisation, such as free movement of workers and equal pay for workers, for the purpose of ensuring uniform and autonomous EU. Directives on the other hand, are adopted in areas that do not seek harmonisation, such as the directive on fixed-term work.¹⁰⁸⁰ In those areas, either domestic laws or directives apply.¹⁰⁸¹

Treaties, regulations, directives, and decisions of the European Court of Justice (ECJ) are the laws of the EU otherwise called union law. In the important case of *Van Gend en Loos v Nederlandse Administratie der Belastingen*¹⁰⁸² the ECJ established the direct effect of [union] law over national laws. In *casu*, a Dutch law was passed contrary to the provisions of Article 25 of the European Community (EC) treaty that prohibited member states from introducing new duties, or raising existing ones, on imports between member states. In relying on Article 25, the Dutch law was set aside by the ECJ on the basis that it was contrary to the EC treaty. Similarly, in *Costa v Entenzionale per l'energiaelettrica (ENEL)*,¹⁰⁸³ the ECJ established the relationship between community and national law. In this case, the ECJ established that:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which...became an integral part of the legal systems of the member states and which their courts are bound to apply.

¹⁰⁷⁹ Merrett *Employment contracts in private international law* (2011) 50.

¹⁰⁸⁰ See European Union Council of Ministers Directive 99/70 concerning the framework agreement on fixed-term contracts.

¹⁰⁸¹ Merrett (2011) 58 (hereinafter referred to as Merrett).

¹⁰⁸² (1963) CMLR 105.

¹⁰⁸³ (1964) ECR 585.

By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity ... and real powers stemming from a limitation of sovereignty or transfer of powers from the states to the community, the member states have limited their sovereign rights, albeit within limited fields, and thus created a body of law which binds their nationals and themselves ... it follows ... that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however, framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.¹⁰⁸⁴

The EU treaties constitute part of the internal legal order of the member states, which means that member states are obliged to comply with their provisions. Regulations are binding in their entirety and are directly applicable in the member states. This means that once a state adopts a regulation, the state does not need any further legislation for its implementation.¹⁰⁸⁵ Directives on the other hand, are binding only with regard to the results to be achieved.¹⁰⁸⁶ Member states are left with the choice as to the form and method of the law. Although directives are not directly binding on member states, an individual may sue the state for loss suffered as a result of non-implementation of a directive.¹⁰⁸⁷ Decisions of the ECJ are binding only on those to whom they are addressed.¹⁰⁸⁸

6.3.2 The European Union institutional set-up

The EU is built on supranational institutions, a manifestation of the political will of its member states, and partial abandonment of sovereignty by each state party to the organisation. The supranational characteristics of the EU distinguish it from other regional organisations. This section focuses on the structures of the EU¹⁰⁸⁹ in an attempt to discuss briefly the role played by the institutions in contributing to the

¹⁰⁸⁴ Ibid.

¹⁰⁸⁵ Derbyshire *English legal system* (2010) 6.

¹⁰⁸⁶ Art 249 EC treaty 1957.

¹⁰⁸⁷ *Francovich and Bonifaci v Italy* (1991) ECR 1-5357.

¹⁰⁸⁸ Ibid.

¹⁰⁸⁹ Sands and Kein *Bowett* (2009) 179-183 and 409-417 (hereinafter referred to as Sands and Klein Bowette).

integration process. Although different other structures have been established,¹⁰⁹⁰ the task of which is to implement the new European monetary policies, the Council of Ministers, the European Commission (Commission), European Parliament (Parliament) and ECJ constitute the focus of this section.¹⁰⁹¹

6.3.2.1 *The Council of Ministers*

The Council of Ministers of the EU is based in Brussels with an outpost in Luxemburg. It is strongly representative of the interests of the member states and is not constrained by “any formal requirement of independence”.¹⁰⁹² It consists of one minister from each of the member states who is answerable to the national parliaments and to the citizens.¹⁰⁹³ The office of president is held on a rotating basis for six-month periods.¹⁰⁹⁴ The sitting of the Council depends on the subject matter on the agenda. For instance, if the Council is to discuss agricultural issues, then the meeting will be attended by agricultural ministers from the member states and the Council will be known as the “Agricultural Council”.¹⁰⁹⁵ Meetings are convened either by the president of the Council of Ministers, or upon the initiative of member states.

The Council of Ministers is entrusted with the following tasks: to adopt union laws; to co-ordinate the broad economic policies of the member states; to conclude international agreements between the EU and other countries or international organisations; to approve the EU budget, jointly with the parliament; to develop the EU’s common foreign and security policy; and to co-ordinate co-operation between the national courts and police forces in criminal matters.¹⁰⁹⁶ The last two areas are areas where member states have not delegated or transferred their powers, but are simply working together with the

¹⁰⁹⁰ The European Council and the European Central Bank (ECB), the task of which is to implement the new European monetary policies; Arts 8 and 12 of the Maastricht treaty 1992. See Brentford “Constitutional aspects of the independence of the ECB” 1998 *International Comparative Law Quarterly (ICLQ)* 75.

¹⁰⁹¹ Art 7 EC treaty.

¹⁰⁹² Deards and Hargreaves *European union law* (2004) 23.

¹⁰⁹³ See Europa http://europa.eu/institutions/inst/council/index_en.htm; accessed 7 September 2011.

¹⁰⁹⁴ The Council decision 2007/5/EC of 1 January 2007.

¹⁰⁹⁵ *Ibid.*, 1.

¹⁰⁹⁶ See Europa (n 1093) above.

Council of Ministers; this is called “intergovernmental co-operation”. In practice, decisions are jointly taken by the Council of Ministers and the parliament in collaboration with the Commission.¹⁰⁹⁷

6.3.2.2 *European parliament (Parliament)*

The parliament¹⁰⁹⁸ is the first and the only multinational parliamentary assembly in the world whose members are democratically elected by direct universal suffrage.¹⁰⁹⁹ The assembly joins together various recognised political groups such as the socialists, Christian democrats and the conservatives¹¹⁰⁰ that represent all views on European integration, from strongly pro-federalist to the openly Eurosceptic,¹¹⁰¹ on the basis of political affiliation rather than nationality. Members are elected every five years by the citizens of the EU to represent the democratic will of the EU’s citizens.¹¹⁰² It sits in Strasbourg where it holds plenary sessions, but meets as a parliamentary committee in Brussels for additional plenary sessions. Debates are conducted in all the EU official languages, reflecting its commitment to “varied and multi [lingual] union which is united in diversity”.¹¹⁰³

The parliament has legislative and supervisory powers. Its legislative power varies considerably depending on the subject matter. In matters relating to agriculture, the parliament must be consulted; this is called the consultation procedure. Basically, once the Commission has drafted legislation, it is sent to the parliament for its advisory opinion, failing which the measure in question is declared invalid. In *Roquette Frères v Council of Ministers of the European Communities*,¹¹⁰⁴ the ECJ declared void a measure of the Council of Ministers because the parliament was not consulted. Although it is a mandatory part of the legislative process, it is merely a consultative

¹⁰⁹⁷ Art 205 EC treaty.

¹⁰⁹⁸ Ibid, arts 189-201 and 137-144.

¹⁰⁹⁹ EP Director General 2008 www.europal.europa.eu at 1-5 (hereinafter referred to as EP Director General).

¹¹⁰⁰ Art 191 EC treaty.

¹¹⁰¹ See Europa (n 1093) above.

¹¹⁰² Every EU citizen irrespective of his place of residence is entitled to vote and to stand as candidate for elections; Sands and Kein (2009) 1 (hereinafter referred to as Sands and Kein).

¹¹⁰³ See EP Director General (n 1099) 3.

¹¹⁰⁴ (1980) ECR 3333-3362.

process, meaning that the parliament's views may or may not be taken into account. As regards its supervisory powers, it has the power to investigate into allegations of maladministration, fraud, and nepotism against the Commission received from EU citizens.¹¹⁰⁵ In this respect, the parliament may appoint an ombudsman to investigate into the complaint.¹¹⁰⁶ In addition to its normative powers, the parliament has power of control over the Commission. This entails the power to appoint commissioners, and to force the resignation of the entire commission by vote of censure in an open ballot passed by two third of its members.¹¹⁰⁷ So far, the majority vote needed to unseat the Commission has not been obtained.

6.3.2.3 *The European commission (Commission)*

The Commission is based in Brussels with an outpost in Luxembourg.¹¹⁰⁸ It consists of 28 full-time and independent commissioners who are chosen on the grounds of their general competence.¹¹⁰⁹ They are appointed for five years and are independent from their member states, but are accountable to the parliament and the Council of Ministers. The office of president of the Commission is held on a rotating basis. The Commission is entrusted with three main roles: guardianship of the EC treaty; formulation of policy; and execution of policy. It also has a representative function in that it may speak and negotiate international agreements on behalf of the EU.¹¹¹⁰ As a formulator, it identifies areas that it considers necessary for consideration by the EU, and if accepted, it makes a draft proposal to the parliament and the Council of Ministers.¹¹¹¹

As a “guardian of treaties”, it is responsible for making sure that the provisions of the treaty and acts of the various institutions are properly applied in all the member states.¹¹¹² Member states are required to “take all appropriate measures, whether

¹¹⁰⁵ Art 194 EC treaty.

¹¹⁰⁶ Ibid, art 195.

¹¹⁰⁷ Magnoste “Appointing and censuring the EC: the adaptation of parliamentary institutions to the community context” 2001 *European Law Journal* 292-310.

¹¹⁰⁸ Deards and Hargreaves (2004) 18 (hereinafter referred to as Deards and Hargreaves).

¹¹⁰⁹ Art 213 EC treaty.

¹¹¹⁰ Ibid, 19.

¹¹¹¹ Ibid, art 211.

¹¹¹² Cuthbert (2009) 12 (hereinafter referred to as Cuthbert).

general or particular, to ensure fulfillment of the obligations arising out of the EC treaty or resulting from action taken by institutions of the community”.¹¹¹³ Failing this, the Commission may bring enforcement proceedings before the ECJ against the non-complying state.¹¹¹⁴ This is in accordance with Article 226 of the EC treaty that provides:

If the commission considers that a member state has failed to fulfill an obligation under the treaty, it shall deliver a reasoned opinion on the matter after giving the state concerned the opportunity to submit its observations. If the state concerned does not comply with the opinion within the period laid down by the commission, the latter may bring the matter before the court of justice.

In terms of Article 226, the non-complying state is given an opportunity to state its case, following which the Commission gives its opinion.¹¹¹⁵ If the state does not comply with the opinion, then the Commission takes the matter to the ECJ. An excellent example of non-compliance is a state’s failure to transpose provisions of a directive into national law.¹¹¹⁶ The Commission also enforces trade and competition policies,¹¹¹⁷ monitors the budgetary situation, and takes stock of government debt in the member states.¹¹¹⁸

6.3.2.4 *European Court of Justice (ECJ)*

The ECJ acts in accordance with the statute of the court and the rules of procedures.¹¹¹⁹ They are composed of 28 and nine independent judges, respectively,¹¹²⁰ appointed for six years, with the ability required for appointment to the highest judicial office in their country;¹¹²¹ and eight Advocate Generals (AG) appointed for six years renewable service, to present to the court legal opinions on pending cases,

¹¹¹³ Art 10 EC treaty.

¹¹¹⁴ Ibid, art 226.

¹¹¹⁵ See *Germany and others v Commission* case 281/85 of 1987 ECR 3202.

¹¹¹⁶ This is provision 5 of the Directive providing for the designation of workers’ representative during collective redundancy. See the *Commission v United Kingdom* Case 383/92 of 1994. See also Eurofound 2007

<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/europeancommissionroleofthe.htm> at 1.

¹¹¹⁷ Art 137 EC treaty.

¹¹¹⁸ Ibid, art 104.

¹¹¹⁹ Protocol on the Statute of the ECJ 17 April 1957.

¹¹²⁰ 27 for the CFI and 9 for the ECJ.

¹¹²¹ Deards and Hargreaves (n 1108) 32.

without their participation in the court proceedings.¹¹²² The opinion of the AG is given at the conclusion of the parties' argument and before judgment. The presence of the AG is an innovative feature in new international Tribunals. The courts may sit in chambers of 13 judges or in three or five.¹¹²³

The ECJ is the highest court and the only body competent to make an authoritative pronouncement on union law. This is based on the court's ability to take an overall view of the community and its legal framework; the opportunity to receive submissions from other institutions and member states; the linguistic advantage of being able to consider all the authentic texts that might make the meaning clear; and the court's familiarity with the purposive and creative approach to interpretation. As the highest court, it is tasked with the interpretation and application of union law;¹¹²⁴ the adjudication of inter-state disputes for non-compliance of union law; claims against one or more of the union institutions; and the granting of preliminary rulings.¹¹²⁵ Reference to the ECJ for interpretation of the union law is mandatory.¹¹²⁶ This is in order to ensure uniformity in the interpretation and application of Union law.¹¹²⁷ The interpretation of union law is ultimately a matter for the ECJ, which uses the EU approach based on the purposive or teleological construction. The interpretation is performed in light of the "objectives of the provision concerned rather than simply its language".¹¹²⁸

Reference to the ECJ is generally under circumstances where the national court considers it necessary to enable it to give judgment, and particularly when there is no remedy under national law. There is no timing of reference, that is, no specified time period within which national courts are obliged to make a reference. In *Irish Creamy Milk Suppliers Association v Ireland*,¹¹²⁹ the ECJ made it clear that it was for national

¹¹²² Donner "The Court of Justice of the European Communities" (1961) 1 *International Comparative Law Quarterly (ICLQ)* 66.

¹¹²³ The court sits in chambers of 13 in exceptional cases based on their complexities and importance.

¹¹²⁴ Art 234 EC treaty.

¹¹²⁵ Ibid, art 220.

¹¹²⁶ Deards and Hargreaves (n 1108) 100-110.

¹¹²⁷ See *Arsenal Football Club PLC v Reed* [2003] 21 ALL ER 137.

¹¹²⁸ Merrett (n 1080) 51.

¹¹²⁹ C-36 and 71/80 [1981] ECR 735.

courts to decide on the most appropriate time. It further decided that it might be more convenient to make reference after the facts of the case and questions of national law have been determined.¹¹³⁰ This of course gives the court a clear legal context in which to give its rulings. However, a national court may decide not to refer a dispute relating to the interpretation of the community law if there is no possibility of appeal,¹¹³¹ if non-reference would not affect the outcome of the case, or where the provisions of the community law is clear (*Acte claire*).¹¹³² An act or law is clear if it has the same meaning in all the languages of the EU.¹¹³³

The ECJ gives preliminary rulings on certain questions relating to visa, asylum, immigration, and freedom of movement of persons.¹¹³⁴ Such requests arise when there is need for the interpretation of treaty, acts of the Union institutions and statutes of secondary bodies.¹¹³⁵ On this aspect, the ECJ acts not as a court of cassation (*cour de cassation*) or Court of Appeal, but only as a body with final authority to give answers to issues of EU law arising between individuals.¹¹³⁶ Proceedings for preliminary ruling take 12 months during which parties to the litigation and EU institutions are given the opportunity to submit their observations.¹¹³⁷ Pre-eminently, upon receipt of a request, all domestic proceedings are enjoined until the preliminary ruling is issued, and the national court is obliged to implement the ruling to the case before it.

6.4 Comparative notes on the harmonisation of laws in Africa and the EU

Harmonisation of law is a key interstate relational issue in economic integration. It deals with how to overcome challenges posed by differences in national legal traditions and laws. These differences exist not only in substantive and procedural laws, but also in the legal cultures and mode of thoughts.¹¹³⁸ It is submitted that differences in national

¹¹³⁰ Ibid.

¹¹³¹ *R v Pharmaceutical Society of Great Britain* [1987] 3 CMLR 951.

¹¹³² Ibid, 116.

¹¹³³ Ibid.

¹¹³⁴ Arts 61-90 EC treaty.

¹¹³⁵ Sands and Keir (n 1089) 416.

¹¹³⁶ Storm (1997) 5 (hereinafter referred to as Storm).

¹¹³⁷ Ibid, 6.

¹¹³⁸ Opong *Legal aspects of economic integration in Africa* (2011) 71.

laws add to the cost of doing business across borders. For instance, a person (investor) transacting in many countries would have to seek the legal advice on the different legal systems. It becomes even more complicated if the person (investor) has to recover assets across a number of jurisdictions. In Roman-Dutch countries, once a debtor's assets are attached, he can no longer deal with the assets until the end of litigation,¹¹³⁹ while in Common-law countries, the assets will still be made available during litigation unless dealing with the assets is specifically prevented through the granting of a pre-trial Mareva injunction.¹¹⁴⁰ This could be a relevant consideration when investing in those countries.

Harmonised or uniform laws are important for any business community as they create certainty in the applicable law, which in turn boosts investors' confidence. Compared to the EU, continental harmonisation of laws in Africa is yet to be actualised. A major impediment to the realisation of this goal is the lack of commitment and political will on the part of African leaders to cede their sovereignty, and to ratify or sign adopted instruments due to the unknown. In the case of the SADC, the Democratic Republic of Congo (DRC) is a good example; it has neither ratified nor signed any of the 15 protocols reviewed and approved by the SADC.¹¹⁴¹ The fear of the unknown has made it difficult for African leaders to cede sovereignty towards the harmonisation of laws and this contributes to a loss of momentum in integration.

The role of the people in the integration process cannot be overemphasised. Nonetheless, if the aim of integration is to be understood, and the harmonised instrument accepted by all, then the people must be involved in the integration and decision-making processes. The EU, for instance, has devised measures ranging from national referendum on EU policies to direct election of EU parliamentarians to accentuate the importance of the people in the integration process.¹¹⁴² In contrast to the EU, African leaders (elite realism) are responsible for the design and implementation of

¹¹³⁹ Ibid, 107.

¹¹⁴⁰ Mareva injunction is relief in *personam* and does not operate as an attachment on property. See Oppong (2011) 107.

¹¹⁴¹ ECA (2004) 49.

¹¹⁴² Babatunde (n 931) 172.

regional initiatives. The launching of the AU and NEPAD are two initiatives that form the pinnacle of efforts by African leaders to rejuvenate the continent. For the success of African integration or harmonisation, it should allow for substantial consultation mechanisms, such as involvement of civil society and the people in the election of members of parliament. As indicated by Babatunde, these measures will go a long way in “granting greater democratic legitimacy and broad support”.¹¹⁴³

Political will is also a crucial ingredient in the integration process, without which there will be little progress.¹¹⁴⁴ In this regard, there must be political will on the part of African leaders to cede their sovereignty and to adhere to regional integration objectives. This includes according regional integration objectives priority over domestic considerations.¹¹⁴⁵ In addition, there should be enough human and material resources to assist member countries where necessary in the implementation of regional integration objectives. Given that the EU has demonstrated positive attitudes towards this end,¹¹⁴⁶ support can be sought from it as well as from development financial institutions.

6.5 Lessons for the SADC

After having considered the various aspects of this chapter, it is now necessary to consider the lessons the SADC can draw from the experience of similar bodies discussed above. Before engaging in detail, the author needs to make few general comments in relation to two matters, namely the nature and effect of adopted legal instruments, and the methods of interpretation of treaty law. It is observed that in the SADC, decision-making is reserved for the Summit, the Council, or anybody to which power is delegated by the Summit. The SADC treaty specifies the types of legal instruments to be adopted,¹¹⁴⁷ but does not indicate their nature or effect on the

¹¹⁴³ Ibid, 173.

¹¹⁴⁴ Allan (n 1059) 8.

¹¹⁴⁵ Quattara (n 907) above.

¹¹⁴⁶ See the EU Green Paper on Development Cooperation 1997.

¹¹⁴⁷ They are decisions and protocols.

member states. This omission, as earlier indicated, “creates a certain amount of legal uncertainty as to the very nature of the SADC law itself”.¹¹⁴⁸

As indicated above, the EU is very specific on the types of legal instruments to be adopted and their effects on the member states, and similarly, we have noted the case of the AU. The AEC treaty not only specifies the relevant organs empowered to adopt legal instruments,¹¹⁴⁹ but also the effect of decisions and regulations of the AU institutions on the member states.¹¹⁵⁰ The approach taken by the EU, OHADA and the AU is commendable, as “it ensures legal certainty and competences of the legal regime”.¹¹⁵¹ Thus, the SADC might consider adopting a similar approach in the transformation of its institutions, and the development of uniform commercial laws.

As indicated in the preceding chapter, when interpreting or resolving disputes the SADC Tribunal is given the opportunity to have regard for applicable principles of international law and the experience of other international courts.¹¹⁵² But neither the SADC treaty nor the Tribunal Protocol specifies the method that the Tribunal will use when interpreting SADC law. In this respect, the ECJ approach is pertinent. In the case of the ECJ, we noted that it uses the purposive or teleological construction in terms of which interpretation is performed, in the light of the “objectives of the provision concerned rather than simply its language”.¹¹⁵³ The ECJ approach emphasises the objectives or purposes of the treaty, because in doing that so it will help the SADC Tribunal to disregard other rules of interpretation and apply the teleological method where necessary.¹¹⁵⁴

6.6 Conclusion

This chapter compares the integration and harmonisation efforts of RIAs in Africa with that of the EU. From the discussion above, it is observed that the EU is more advanced

¹¹⁴⁸ Zenda (n 980) above.

¹¹⁴⁹ Arts 10 and 13 AEC treaty.

¹¹⁵⁰ Ibid.

¹¹⁵¹ Zenda (n 980) 522.

¹¹⁵² Art 21(b) Tribunal Protocol 2000.

¹¹⁵³ Merrett (n 1128) above.

¹¹⁵⁴ Ibid, 523.

than Africa. This is based on the fact that it has harmonised many areas of its laws.¹¹⁵⁵ Within the African context, it is observed that the treaties establishing RECs set wide-ranging objectives, with emphasis on trade and macro-economic integration. In the area of trade, the RECs focused on increasing trade among members by removing barriers and promoting trade facilitation measures.¹¹⁵⁶ Efforts to create FTAs and customs unions occupied a part of RECs' integration endeavours and investment. COMESA has already achieved the legal requirements of an FTA. UEMOA, CEMAC and EAC have already fully functioning customs unions¹¹⁵⁷ while the SADC's customs union is underway. Macroeconomic convergence differs among the RECs, partly because of different development levels or historical tradition. UEMOA and CEMAC have made measurable efforts towards the creation of monetary unions, while COMESA has just recently adopted convergence criteria.¹¹⁵⁸

African countries have also made attempts towards strengthening co-operation and harmonisation of policies on the free movement of people, due to its importance to socio-economic development and regional integration. Efforts in this regard entail liberalisation of regional labour markets through the harmonisation of labour laws, allowing for free movement of people across borders, and establishing rights of residence and establishment.¹¹⁵⁹ ECOWAS has ratified its protocol on this issue, while EAC and CEMAC are close to reaching agreement on the free movement of people and their rights of residence. The SADC and COMESA have not ratified their protocols in these areas.¹¹⁶⁰ From the discussion, it is clear that very little progress has been made by African countries towards the harmonisation of business law.

It is also observed that many African countries have found it convenient and desirable to ratify or otherwise adopt some of the international conventions relating to the different

¹¹⁵⁵ Paras 6.3.1 above.

¹¹⁵⁶ ECA (1053) 229.

¹¹⁵⁷ *Ibid*, 236.

¹¹⁵⁸ *Ibid*, 237.

¹¹⁵⁹ See paras 6.2.2 above.

¹¹⁶⁰ *Ibid*, 241.

aspects of international commercial law. This raises the question of a desirable approach for African countries towards the harmonisation of laws.¹¹⁶¹

¹¹⁶¹ Gbenga (n 5)131.

CHAPTER 7: International Instruments: Basis for Developing Uniform Commercial Rules

7.1 Introduction

Arguably, governments and firms can both benefit from uniform or harmonised rules. For governments, they benefit from a device that addresses the concerns of investment, which in turn helps to attract investment at lower cost, while firms benefit from reduced risk and a more reliable mechanism for protecting their rights if their relationship with other firms deteriorates.¹¹⁶² The question is of course on what basis such a reform can take place. Broadly speaking, such a reform can take place by transplantation of foreign law or internationally agreed instruments.¹¹⁶³ In the preceding chapter, it was observed that many African countries have found it convenient and desirable to ratify or otherwise adopt some of the international conventions relating to the different aspects of international commercial law.¹¹⁶⁴ This raises the question of a desirable approach for African countries towards the harmonisation of laws or the development of a commercial law structure.¹¹⁶⁵ It is submitted that uniform and harmonised commercial rules are best achieved through internationally agreed instruments and this is for a number of reasons, the first being that many of the reforms in the field of commercial law were done along ideological lines.¹¹⁶⁶ Secondly, it is because international instruments proposed a range of possible schemes or solutions in achieving some degree of international uniformity.¹¹⁶⁷

The primary aim of this chapter is to provide the SADC with a sense of how uniform or harmonised commercial law rules are developed. In this respect, the chapter seeks to discuss some of those international instruments that have changed the face of commercial law around the world; this stems from a desire to find a comprehensive set

¹¹⁶² WB and Oxford University Press *World Development Report 2005: A better investment Climate for everyone* (2004) 179.

¹¹⁶³ Zeller 2002 <http://eprints.vu.edu.au/857/1/ZellerSigCISGHarmonisation.pdf> at 2 (hereinafter referred to as Zeller).

¹¹⁶⁴ Ch 6 paras 6.6 above.

¹¹⁶⁵ Gbenga (n 1161) above.

¹¹⁶⁶ Ibid.

¹¹⁶⁷ Ibid.

of uniform or harmonised commercial law rules for the SADC. As a point of departure, this chapter commences with this short introduction; followed by a summary of some international and regional instruments and their significance to the SADC. One could ask what the relevance is of this chapter. The practical value of this chapter lies mainly in the possibility it offers SADC policy-makers in the development of uniform or harmonised commercial law structure.

7.2 Summary of some international instruments

It is submitted that international rules and standards can help to shape investment climates as the intensity of interactions between governments and cross-border trade and investment expands.¹¹⁶⁸ As the WB puts it:

Beyond reducing transaction costs, adoption of international standards can also facilitate domestic policy reform when local interest groups have conflicting preferences. Adoption of international standards can also signal to firms, consumers, and other groups the application of high regulatory standards. The tension between local customisation and international harmonisation play out in proposals to develop international rules and standards on a wide range of issues relevant to investment climate. Efforts to develop uniform standards to ease international commerce have long been a focus of private bodies such as the international chamber of commerce. Complementary efforts at the intergovernmental level include those of the United Nations Commission of International Trade (UNCITRAL) and a variety of other international agencies.¹¹⁶⁹

Efforts to develop uniform rules and standards to ease international commerce have long been a focus of private bodies and a variety of international agencies.¹¹⁷⁰ However, it should be noted that efforts to promote international co-operation on issues relevant to the trade and investment climate are not limited to arrangements between governments; international agencies are also involved in the development of international norms. In this regard, this chapter seeks to discuss the efforts of some international agencies in the development of international instruments governing insolvency, company, and employment and their dispute settlement mechanisms.

¹¹⁶⁸ WB and Oxford University Press (2004) 181 (hereinafter referred to as WB Development Report).

¹¹⁶⁹ Ibid.

¹¹⁷⁰ Ibid.

7.2.1 *International instruments relating to insolvency*

Insolvency is defined as “when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets”.¹¹⁷¹ This definition distinguishes between the two types of insolvency: the cash-flow insolvency and balance sheet insolvency. In an effort to deal with the subject matter, several international instruments have been developed, some of which are the WB Principles and Guidelines on Effective Insolvency and Creditors’ Rights (WB Principles),¹¹⁷² and the EU Insolvency Regulation.¹¹⁷³ UNCITRAL has a long history in insolvency matters¹¹⁷⁴ and has adopted a number of international instruments on insolvency and cross-border insolvency; two of which are the Model Law¹¹⁷⁵ and the Legislative Guide.¹¹⁷⁶

However, it should be noted that a Model Law would be used differently to a Legislative Guide. A Model Law is simply a legislative text recommended to states for adoption as part of national law, with or without modification for the settlement of cross-border insolvency disputes, while a Legislative Guide is a reference document designed to provide guidance to legislators and other users in the preparation or reviewing of legislation relevant to insolvency.

7.2.1.1 *The UNCITRAL Model Law on Cross-Border Insolvency (Model Law)*

The Model Law is not a treaty or convention; it is an instrument open to states for adoption or incorporation. It is a flexible instrument that gives enacting states the option to add or omit some of its provisions in order to fit their national jurisdictions. A number

¹¹⁷¹ Paras 12 (s) Legislative Guide (n 202) above.

¹¹⁷² WB Revised Principles and Guidelines for Effective Insolvency and Creditor Rights System (2005) at: <http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/04/20/00033495520090420051400/Rendered/PDF/481660WP0FINAL10Box338887B01PUBLIC1.pdf>; accessed 09 January 2013 (Hereinafter referred to as WB Principles).

¹¹⁷³ Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings (hereinafter referred to as Regulation).

¹¹⁷⁴ Omar “Disclaiming onerous property in insolvency: A comparative study” 2010 *International Insolvency Review* 60-61.

¹¹⁷⁵ Model Law (n 202) above.

¹¹⁷⁶ Legislative Guide (n 1171) above.

of influential commercial states' insolvency law is based on the Model Law.¹¹⁷⁷ Although progress of adoption of the Model Law is slow, Rajah et al welcome its adoption across many jurisdictions because it is beneficial to creditors.¹¹⁷⁸ For Friman,¹¹⁷⁹ “the enactment of the Model Law without too far-reaching modifications would assist the achievement of reciprocity and facilitate future work towards a more ambitious and comprehensive regime”. It would also save the time of having to enact such law, and it facilitates co-operation between states.

It is submitted that the modification of the provisions of the Model Law is not a good idea because it defeats the very purpose of a uniform insolvency law, and it complicates foreign readers' access to the provisions.¹¹⁸⁰ Also, it restricts the opportunity to adopt a uniform insolvency law and the promotion of the principle of universality.¹¹⁸¹

The Model Law consists of 32 articles divided into five chapters – chapter I contains general provisions (Articles 1-8); chapter II – access of foreign representatives and creditors to courts in the enacting state (Articles 9-14); chapter III – recognition of a foreign proceeding and relief (Articles 15-24); chapter IV – co-operation with foreign courts and foreign representatives (Articles 25-27); and chapter V – concurrent proceedings (Articles 28-32). These provisions are designed to:¹¹⁸²

- facilitate co-operation between courts and officials of the enacting and foreign states involved in cross-border insolvency;
- achieve greater legal certainty for trade and investment;
- protect and maximise the value of the debtor's assets for the benefits of all interests;

¹¹⁷⁷ These are some examples of countries that have adopted the Model Law: United Kingdom, Australia, South Africa, Eritrea, Japan, Mexico, Serbia, Romania and OHADA. See (<http://www.uncitral.org/english/status/status-e.htm>; accessed 27 June 2011).

¹¹⁷⁸ Carter “Inter-court co-operation in insolvency: Limits and options” 2011 *Quarterly Journal of INSOL International* 33.

¹¹⁷⁹ Friman “UNCITRAL Model Law on Cross Border Insolvency: An introduction” 8 and 25. The Model Law does not require reciprocity but does not completely rule out such a requirement (hereinafter referred to as Friman).

¹¹⁸⁰ Ibid.

¹¹⁸¹ Art 24 Model Law.

¹¹⁸² Ibid, art 35.

- achieve fair and efficient administration of cross-border insolvency that protects the interests of all creditors and other interested persons; and
- facilitate the rescue of financially troubled business entities for the purpose of protecting investment and preserving employment.

The provisions of the Model Law are subject to any ratified international treaty or agreement ratified by a state. This means that in the event of a conflict between the provisions of the Model Law and international law, the provisions of the international law prevails.¹¹⁸³ Regarding its scope of application, it applies specifically to insolvency proceedings concerning the same debtor. The debtor here refers to both natural and legal persons with the exclusion of banks, insurance companies, and a group of similar companies.¹¹⁸⁴ Specifically, the provisions apply where:¹¹⁸⁵

- an inward-bound request is made: that is when assistance is sought by a foreign representative from an enacting state;
- an outward-bound request is made: when an enacting state is seeking for assistance from a foreign state;
- in the event of concurrent proceedings regarding the same debtor; and
- when foreign creditors and other interested persons request for the commencement of, or participation in, proceedings in the enacting state.

The Model Law does not specify the competent jurisdiction or the applicable law in cross-border insolvency matters. It provides the criteria in determining insolvency proceedings among states, competent jurisdiction to open insolvency proceedings, the applicable law, recognition for such proceedings by other states and co-operation among liquidators and administrators of such proceedings. The Model Law provides for two main proceedings that may be commenced: foreign main proceedings and foreign non-main proceedings. A foreign main proceeding takes place where the debtor has his

¹¹⁸³ Ibid, art 3.

¹¹⁸⁴ Ibid, art 1 (2).

¹¹⁸⁵ Ibid, art 1 (1).

centre of main interest,¹¹⁸⁶ while a foreign non-main proceeding is restricted only to countries where the debtor has an establishment.¹¹⁸⁷

In any event, a foreign representative¹¹⁸⁸ seeking recognition in a foreign state is required to file an application accompanied by all relevant documents before the competent court or authority of the foreign state.¹¹⁸⁹ This includes disclosure of any known proceedings regarding the debtor¹¹⁹⁰ to enable the foreign state to ascertain whether the foreign proceeding is a foreign main proceeding or foreign non-main proceeding¹¹⁹¹ and whether it is a concurrent proceeding.¹¹⁹² It should be mentioned that the application does not subject the applicant or the foreign assets of the debtor to the jurisdiction of the foreign state.¹¹⁹³ If the foreign court is satisfied that the threshold requirements have been met, it may decide to recognise and assist the foreign representative.¹¹⁹⁴ Pending recognition of the foreign representative, the foreign state may at the request of the foreign representative and if necessary to protect the assets of the debtor and the creditors, grant relief of a provisional nature.¹¹⁹⁵ This includes a stay of execution against the debtor's assets, the administrator entrusting the debtor's assets to the foreign representative, or a designated person, for the purpose of preserving and protecting the value of the assets.

¹¹⁸⁶ The center of main interest is defined as the “place where the debtor conducts the administration of its main interests on a regular basis and is therefore ascertainable by third parties”. See the Regulation, Recital 13.

¹¹⁸⁷ Ibid, art 2 (c) and (d). Art 2 (f) Model Law defines establishment to mean “any place of operations where the debtor carries out non-transitory economic activity with human means and goods and services”.

¹¹⁸⁸ Ibid, art 2. Art 2 defines a foreign representative as “a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative or the foreign proceeding”.

¹¹⁸⁹ Ibid, arts 4 and 9 and 15 (2)-(4). The documents include a certified copy of the foreign decision, the court certificate as to the existence of the foreign proceedings and the appointment of the foreign representative.

¹¹⁹⁰ Ibid, arts 15 (3) and 18 (b).

¹¹⁹¹ Ibid, art 17 (2).

¹¹⁹² Ibid, art 30.

¹¹⁹³ Ibid, art 10.

¹¹⁹⁴ Smith “Some aspects of comity and the protection of local creditors in cross-border insolvency law: South Africa and the United States compared” 2002 *South African Mercantile Law Journal* (SA Merc.LJ) 16.

¹¹⁹⁵ Art 19 (1) Model Law.

Recognition is entirely a matter of discretion of the foreign state. The foreign state may refuse recognition if it is contrary to the public policy of the state, that is, an *ordre publique* exception,¹¹⁹⁶ or if the grounds for recognition were fully or partially lacking, or have ceased to exist.¹¹⁹⁷ Upon recognition of a foreign proceeding, three basic stays come into effect locally: stay of individual actions and proceedings against the debtor's assets, rights, obligations, and liabilities; stay of transfer or disposal of the debtor's assets; and execution against the debtor's assets.¹¹⁹⁸ In this respect, universality prevails over territoriality. It must however be emphasised that the provisions of Article 20(1) do not affect the rights of foreign creditors and the foreign representative to intervene or participate in any proceedings regarding the debtor;¹¹⁹⁹ the right of the foreign representative to bring actions against detrimental acts to creditors;¹²⁰⁰ or the rights of the foreign creditors and the foreign representative to commence local proceedings.¹²⁰¹

In the event of concurrent proceedings, the Model Law requires maximum co-operation between the local courts and the foreign representative. This may be through a designated person, or through direct communication of information by any means possible.¹²⁰² The purpose is to “get rid of time-consuming formalities or diplomatic channels”¹²⁰³ and to speed up the winding-up process. To underline this co-operative spirit; the Model Law contains the so-called “hotchpots” rule.¹²⁰⁴ Article 32 states that “a creditor who has received payment in one proceeding shall not receive payment for the same claim in another proceeding regarding the same debtor if the latter payment would mean that the creditor proportionally receives more than other creditors of the same

¹¹⁹⁶ Ibid, Art 6.

¹¹⁹⁷ Ibid, art 17 (4).

¹¹⁹⁸ Ibid, art 20 (1).

¹¹⁹⁹ Most states exclude the participation of foreign revenue or social security claims. Previously, the United States did not allow for such claims, but under section (s) 1513 the claims are governed by any applicable law to which the United States is a party. See Wood *Principles of international insolvency law* (2007) 954.

¹²⁰⁰ Art 23 (2) Model Law.

¹²⁰¹ Ibid, art 24.

¹²⁰² Ibid, art 27.

¹²⁰³ Wood (2007) 966 (hereinafter referred to as Wood).

¹²⁰⁴ Art 32 Model Law.

class of preference". Thus, payment received in one proceeding is taken into account in other proceedings to ensure that all creditors receive at least a dividend.

7.2.1.2 *UNCITRAL Legislative Guide and World Bank Principles*

Recognising the importance of strong, effective, and efficient insolvency regimes in encouraging economic development and investment, the Legislative Guide and the WB Principles were adopted. The Legislative Guide and the WB Principles are designed to encourage the adoption of effective and efficient national corporate insolvency regimes or the review of existing laws and regulations by national authorities and legislative bodies.¹²⁰⁵ States are urged to give due consideration when assessing the economic efficiency of their insolvency regimes, or when revising or adopting legislation relevant to insolvency.¹²⁰⁶

The key elements of the Legislative Guide are arranged into six chapters: chapter I deals with the application and commencement criteria; chapter II embraces the effects of commencement of insolvency proceedings on the debtor and his assets, constitution of insolvent estates, protection and preservation of the estate, use and disposal of assets, post-commencement finance, treatment of unexecuted contracts, exercise of avoidance provisions, rights of set-off, and financial contracts and netting; and chapter III examines the role of the debtor and insolvency representatives and their various duties and functions as well as mechanisms to facilitate creditor participation.¹²⁰⁷ Under the Legislative Guide, only appropriately qualified persons with knowledge and experience of the law can be appointed as an insolvency representative.¹²⁰⁸ Chapter IV deals with issues relating to the proposal and approval of a re-organisation plan and proceedings; chapter V addresses the different types of creditor claims and their treatment, as well as rules of priority and distribution; and chapter VI deals with issues relating to the conclusion of insolvency proceedings, including discharge and cross-

¹²⁰⁵ Wessels *Cross-Border insolvency law: International instruments and commentary* (2007) 10-11.

¹²⁰⁶ UN General Assembly, Resolution 59/40.

¹²⁰⁷ It should be noted that the participation of creditors depends on each legal system. In common law systems, creditors play a crucial role in the adoption of a reorganisation plan whereas in continental systems, the role of creditors is reduced to advisory functions only. See They "Comment and summary" in Ringe *et al* (eds) *Current issues in European financial and insolvency law: Perspectives from France and the United Kingdom* (2009) 88.

¹²⁰⁸ Legislative Guide 174-180 paras 35-40.

border issues which are addressed by the Model Law and its Guide to Enactment.

The WB principles on the other hand, were developed from input by staff, insolvency experts, private and public specialists, and from the international community. The 35 principles are grouped into the following topics: legal framework for creditor rights;¹²⁰⁹ legal framework for insolvency;¹²¹⁰ features pertaining to corporate rehabilitation;¹²¹¹ informal corporate workouts and restructuring;¹²¹² and implementation of the insolvency system (institutional and regulatory systems).¹²¹³ Like the Legislative Guide, the Principles provide for the appointment of qualified persons as insolvency representatives. Unlike the Legislative Guide, the WB principles are intended to assist countries in their efforts to evaluate and improve core aspects of their commercial law systems essential to a sound investment climate and commerce. These essential aspects include credit access, protection mechanism, risk management, restructuring practices and procedures, formal insolvency procedures and institutional and regulatory frameworks.¹²¹⁴ In addition, the principles are broader in scope in the sense that they cover a wide range of issues including fundamental elements suitable for diverse systems and institutional and regulatory aspects.

In sum, the Legislative Guide recommendations and the WB principles are intended to help strengthen domestic institutions, enable countries to identify vulnerabilities, and improve transparency. It is also to help reform and foster effective insolvency and creditor rights regimes. Based on the complementarities between the Legislative Guide recommendations¹²¹⁵ and the WB principles, the Legislative Guide and the WB principles were unified into a recognised Standard for Insolvency and Creditor Rights

¹²⁰⁹ WB Principles 1-5.

¹²¹⁰ Ibid, 6-16.

¹²¹¹ Ibid, 17-24.

¹²¹² Ibid, 25-26.

¹²¹³ Ibid, 27-35.

¹²¹⁴ See (n 1210) above.

¹²¹⁵ See (www.uncitral.org/uncitral/en/commission/working_groups; accessed 3 May 2011).

Regimes known as the Insolvency and Creditor Rights (ROSC) Standard for use as a benchmark in the ROSC assessment.¹²¹⁶

7.2.1.3 *The Unified Insolvency and Creditor Rights Standard*

The Unified Insolvency and Creditor Right Standard acknowledge the importance of a sound insolvency system and identified some of its benefits.¹²¹⁷ Insolvency and Creditor Right notes that a sound insolvency system helps to promote financial stability, ensures efficient access to credits and allocation of resources, and enhances productivity and growth and enables commercial stakeholders to better manage financial risk and other difficulties in the enterprise sectors in a timely way so as to minimise systemic risk in the bankruptcy system.¹²¹⁸ Insolvency and Creditor Right is grouped into the following topics:

- creditor rights;
- risk management and corporate work;
- commercial insolvency; and
- implementation: institutional and regulatory frameworks.

7.2.1.3.1 Creditor Rights¹²¹⁹

In terms of the World Bank principles, a modern credit-based economy should provide for the creation, recognition, and enforcement of security interests in all types of property (immovable and movable) arising by agreement, or by operation of the law.¹²²⁰

The ability of creditors to own and freely transfer interest in property should be governed by a transparent and efficient registry system with well-defined rules for registration of security interests and priority governing competing claims or interest in the same property.¹²²¹ The debate is between according priority to secured interests, or to

¹²¹⁶ See (<http://siteresources.worldbank.org/Gild/Resources/Final.ICRStandard-march2009.pdf>; accessed 20 July 2011).

¹²¹⁷ Ibid.

¹²¹⁸ Ibid.

¹²¹⁹ Ibid, 5-7.

¹²²⁰ WB Principle 3.

¹²²¹ Ibid, 4 and 16.

employees who constitute a vital part of the enterprise. However, the WB principles recommend a balance of the rights of employees with those of other creditors.¹²²²

A creditor's ability to enforce his claims plays an important role in enhancing his confidence that fuels investments, lending, and commerce. Conversely, uncertainty about the enforceability of contractual rights increases the cost of credit, and in severe cases leads to credit tightening.¹²²³ This indicates that a credit-based harmonised commercial law should be designed to promote reliable and transparent procedures for enforcing secured and unsecured claims by means of individual actions (enforcement and execution), and collective action through insolvency proceedings.¹²²⁴

7.2.1.3.2 Risk Management and Corporate Workout¹²²⁵

The WB Principles recommend the creation of a reliable and transparent environment that will go a long way to enhance creditors' confidence. In terms of the principles, there should be a transparent credit information system that provides reliable credit information concerning the borrower's payment and default history. The information must be confidential, but accessible to borrowers and regulators.¹²²⁶ Furthermore, the environment must be one that encourages participants to engage in consensual arrangements designed to restructure a dying enterprise.¹²²⁷ It includes disclosure of accurate financial information on the distressed enterprise,¹²²⁸ and the development of a Code of Conduct for dealing with corporate financial difficulty.¹²²⁹ Moreover, directors and officers of enterprises must be held accountable for decisions when the company is facing imminent risk of insolvency.¹²³⁰ Basically, directors and officers should be held accountable for any wilful, reckless, or wrongful trading causing loss or harm to

¹²²² Ibid.

¹²²³ Wessel (2007) 62 (hereinafter referred to as Wessels).

¹²²⁴ WB Principles, 1 and 2.

¹²²⁵ Ibid, 8-12.

¹²²⁶ Ibid.

¹²²⁷ Legislative Guide, part two, chap. IV, para 76-94.

¹²²⁸ WB Principles 25.

¹²²⁹ Ibid, 26.

¹²³⁰ General Principle for Corporate Governance and Officer and Director Liability to their Shareholders are dealt under the OECD Principles for Corporate Governance.

creditors. This is to ensure responsible corporate behaviour while fostering reasonable risk taking.

7.2.1.3.3 Commercial Insolvency framework¹²³¹

In this section, the insolvency and creditor right proposes rules to deal with substantive issues of insolvency. To begin with, an insolvency law should be deeply rooted in the commercial legal system of the country and reflective of the socio-economic goals of the country, in order to be properly monitored and implemented;¹²³² the insolvency law should represent a balance of several objectives ranging from the maximisation of debtor's assets by providing an option to reorganise, timely, efficient and impartial resolution of insolvencies; establish a framework for cross-border insolvency, with recognition of foreign proceedings¹²³³ and the protection of creditors' rights through the establishment of a predictable and transparent process.¹²³⁴ The importance of broader goals is that they maintain social order and stability.

In addition, the insolvency law should specify types of insolvency proceedings.¹²³⁵ The principles recommend a convenient, inexpensive, and quick insolvency process. An insolvency law should also identify the debtors that may be subject to insolvency proceedings, and those debtors that may require a special regime;¹²³⁶ the rights and obligations of the debtor; the time of commencement;¹²³⁷ and the provision of notice.¹²³⁸ The time of commencement of proceedings is vital for the avoidance of further diminution in the value of assets, creation of certainty and transparency for both debtors and creditors and, the improvement of the chances of reorganisation.¹²³⁹ For the

¹²³¹ WB Principles 13-48.

¹²³² Ibid, 6.

¹²³³ Ibid, 24 and Legislative Guide part one, chap. I, paras 4-27.

¹²³⁴ WB Principles 12 and Legislative Guide Recommendation (Recommendations) 14-29.

¹²³⁵ Reorganisation and liquidation are the two main types of proceedings.

¹²³⁶ WB Principle 9 focuses on enterprises and corporate entities while the legislative guide Focused on debtors (legal and natural persons) engaged in economic activity without providing for a definition for the term "economic activity"; recommendation 8-13.

¹²³⁷ Recommendations 14-29.

¹²³⁸ The Legislative Guide contains a number of recommendations regarding the provision of notice.

¹²³⁹ Wessel (n 1223) 304.

Legislative Guide, a flexible approach that emphasises quick decision-making is desirable.

Moreover, the law should specify the eligibility criteria;¹²⁴⁰ the effects of insolvency proceedings on the debtor and his assets;¹²⁴¹ the constitution of the insolvent estate;¹²⁴² the use and disposition of assets of the insolvent estate and the extent to which insolvency representatives can avoid certain types of transactions that are prejudicial to creditors;¹²⁴³ and dispose of assets, or elect whether to continue or not with uncompleted contracts. The insolvency law should specify the applicable law to the validity and effectiveness of rights and claims. Generally, the law of the state where proceedings are commenced is the *lex fori concursus*, which applies to all aspects relating to the administration and distribution of assets, while *lex situs* (law of the place where immovable property is located) applies to immovable property.¹²⁴⁴

7.2.1.3.4 Implementation: Institutional and Regulatory frameworks

This section deals with the role of the court and its staff. The WB Principles recommend the independence and impartiality of the judiciary to enable an effective discharge of its duties and functions. The duties and functions of the judiciary with respect to insolvency and related matters must be clearly defined. In some jurisdictions, it is limited to the commencement of insolvency proceedings, its supervision, and rendering of insolvency judgments. The insolvency law must also contain rules relating to the appointment, training and performance,¹²⁴⁵ as well as the removal and replacement of insolvency representatives.¹²⁴⁶ The grounds may include inability to perform, lack of required qualifications, incompetence or failure to perform, and engagement in illegal acts or conducts.¹²⁴⁷ The court system should be staffed by commercial or insolvency

¹²⁴⁰ In most jurisdictions, debtors, creditors and even the judicial authority are entitled to file for the commencement of insolvency proceedings.

¹²⁴¹ Recommendation 39-51 and WB Principles 10.

¹²⁴² It consists of assets at the time of insolvency and those acquired after the commencement of insolvency; WB Principles, 13.

¹²⁴³ WB Principles, 15.

¹²⁴⁴ Recommendations 30-34.

¹²⁴⁵ Legislative Guide part two, chap. I, para 19.

¹²⁴⁶ Legislative Guide, part two, chap. II, para 35-74.

¹²⁴⁷ Wessels (n 1223) 62.

specialists who have the required qualifications, experience, and training.¹²⁴⁸ In some jurisdictions, there are both insolvency representatives and the supervisory body who are both responsible for the administration and distribution of assets.¹²⁴⁹ In such a case, insolvency and creditors' right requires the independence of the supervisory and representative bodies, and they must be equipped with the resources and powers necessary for the discharge of their duties.

7.2.1.4 *The EU Regulation on Insolvency Proceedings*

In order to address conflict of law issues, the EU has harmonised the national rules of jurisdiction and choice of law of its member states into private international law instruments that now form part of the union law. As indicated in the preceding chapter, it is to achieve uniformity in the interpretation and application of rules and to further the internal market.¹²⁵⁰ It is also to avoid, as far as possible, the multiplication of the bases of jurisdiction in relation to the same legal relationship, and to reinforce legal protection available to persons established in the EU. At the same time, it also allows the plaintiff to identify the court to which he may bring an action against the defendant.¹²⁵¹ It must be reiterated that the European private international law instruments consist of regulations and directives, both of which form part of union law, and the difference between the instruments lies in the purpose for which they were created.

In response to the large volume of business interactions between the EU members, the European Convention on insolvency proceedings was established.¹²⁵² The Convention intended to harmonise insolvency proceedings across EU member states and to facilitate the completion of the internal market. The Convention was not ratified due to the United Kingdom's failure to sign the Convention; this was due to political differences between United Kingdom and other member states arising from the mad cow disease called "bovine spongiform encephalopathy", and its political differences with Spain on

¹²⁴⁸ WB Principles 27-35.

¹²⁴⁹ See the OHADA Insolvency Act 1999.

¹²⁵⁰ Merrett (n 1081) 50.

¹²⁵¹ Ibid, 52.

¹²⁵² 23 November 1995.

the sovereignty of Gibraltar.¹²⁵³ In 2002, the Convention was superseded by the EU Regulation on Insolvency Proceedings. The Regulation was adopted by the Council in 2000¹²⁵⁴ and came into effect in 2002.¹²⁵⁵ The Regulation is intended to overcome difficulties between the EU member states¹²⁵⁶ and to improve “the efficiency and effectiveness of cross-border proceedings within Europe”.¹²⁵⁷

Like other community regulations, the regulation is directly and equally applicable in all contracting states without any need for incorporation or implementing legislation on the part of a member state.¹²⁵⁸ The Regulation takes precedence over national laws in the event of a conflict.¹²⁵⁹ Since the Regulation constitutes part of the internal legal order of the member states, national courts are obliged to apply the Regulation within their jurisdiction. Article 43 gives the ECJ the jurisdiction to give rulings on the interpretation of the convention, which is in accordance with general principles that stem from the corpus of national legal systems and the objectives of the convention.¹²⁶⁰ Regarding its scope of application, it specifically applies to collective proceedings relating to an insolvent debtor (juridical person, a businessperson, a common consumer, or an estate of a deceased).¹²⁶¹

Like UNCITRAL, the EU does not attempt a substantive unification of the insolvency law of its member states; rather, it provides a framework within which the different systems can operate. It determines the jurisdiction to open insolvency proceedings, the applicable law, and its effects on other member states.¹²⁶² It also provides for two main proceedings that may be commenced – main and secondary proceedings. The main

¹²⁵³ See (<http://articles.cnn.com/keywords/gibraltar>; accessed 12 April 2012). See also Fletcher “The European Community Convention on Insolvency Proceedings: An overview and comment with United States interest in mind” 1997 *Business Journal of International Law* 25.

¹²⁵⁴ 29 May 2000.

¹²⁵⁵ 31 May 2002.

¹²⁵⁶ Bogdan “EU Bankruptcy Convention” 1997 *International Insolvency Review* 114.

¹²⁵⁷ Recital 8 *Regulation*.

¹²⁵⁸ Art 249 and S 2(1) *European Communities Act* 1972. See Recital 33 *Regulation*.

¹²⁵⁹ See Case C-184/89 *Nimz v Freie und Hansestadt Hamburg* [1991] ECR I-297.

¹²⁶⁰ See the case of *LTU v Eurocontrol* 29/79 [1976] ECR I-1541.

¹²⁶¹ Art 1 (2) *Regulation* excludes from the scope of the *Regulation* insurance undertakings, credit institutions and most investment undertakings.

¹²⁶² Spedding “COMI migration: History and future” 2008 *Corporate Rescue and Insolvency* 183.

proceeding is open where the debtor has his centre of main interest (COMI). The purpose of COMI is to enable creditors in particular to know where the company is located.¹²⁶³

The Regulation does not define the term “COMI”, but there is a rebuttable presumption to the effect that a “debtor’s COMI is located in the country in which the debtor has his registered office”.¹²⁶⁴ In terms of Recital 13, a debtor’s COMI “should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties”. The *locus classicus* remains the ruling of the ECJ in *Re Eurofood IFSC Ltd*.¹²⁶⁵ In *casu*, the ECJ emphasised that the COMI had to be ascertainable by third parties. This means therefore that the presumption can be rebutted if the company’s creditors’ can show that the company’s COMI is in fact elsewhere.¹²⁶⁶ By implication, a company does not have to be registered within the EU to take advantage of the Regulation.¹²⁶⁷ In *Re Brac Rent-a-car International Inc*,¹²⁶⁸ although the company was incorporated in Delaware (United States of America), the company was put into administration in the United Kingdom, because the UK was found to be its COMI.¹²⁶⁹

In light of the above, we may conclude that a debtor’s COMI can be either at his place of incorporation, or where he conducts his business activities on a regular basis as determined by the creditors. The one problem with this is that a debtor may be left in legal limbo because of disagreement over the debtor’s COMI. Once COMI is established, such a state will have jurisdiction to open main insolvency proceedings covering all assets of the debtor wherever they might be situated in the EU. That state applies its insolvency law (*Lex Concursus*) in the determination of issues such as assets

¹²⁶³ *Hellas Telecommunications (Luxembourg) II SCA* [2010] BCC 295.

¹²⁶⁴ Art 3(1) *Regulation*.

¹²⁶⁵ [2006] BCC 397.

¹²⁶⁶ See *Geveran Trading Co Ltd v Skjevsland* [2003] BCC 391 where it was held that the most important third parties are creditors.

¹²⁶⁷ *Ibid*.

¹²⁶⁸ [2003] BCC 248.

¹²⁶⁹ See *InteredilSrl (in liquidation) v FallimentoInteredilSrl and Another* 2011] EUECJ C-396/09. In *casu*, the ECJ considered England as the place where the company had its “central administration” as being criterion for jurisdiction.

that form part of the estate; the powers of creditors and liquidators; the lodging,¹²⁷⁰ verification and admission of claims;¹²⁷¹ the distribution of proceeds; and the ranking of claims.¹²⁷² This is subject to certain exceptions that include third parties' rights in *rem* and reservation of title,¹²⁷³ set-off rights,¹²⁷⁴ contracts relating to immovable property,¹²⁷⁵ and contracts of employment.¹²⁷⁶

Other contracting states are obliged to recognise the insolvency proceedings, the powers of the liquidator or administrator¹²⁷⁷ and the court's judgment.¹²⁷⁸ This principle was enforced in the *Eurofood* case¹²⁷⁹ in which the ECJ ruled that, "the main insolvency proceedings opened by a court of a member state must be recognised by the courts of the other contracting states, without the latter being able to review the jurisdiction of the court of the opening state".¹²⁸⁰ The only obstacle to recognition is if the judgment is manifestly contrary to the public policy, fundamental principles, or the constitutional rights and liberties of the individuals of the state in which recognition is sought.¹²⁸¹ Nevertheless, the opening of main insolvency proceedings does not bar the commencement of secondary proceedings in other member states.¹²⁸²

Secondary proceedings are limited only to those countries in which a bankrupt debtor has an establishment. In the words of Article 2 (h) of the Regulation, an establishment is "any place of operations where the debtor carries out a non-transitory economic activity

¹²⁷⁰ Art 40 *Regulation*.

¹²⁷¹ Besides the creditors, tax authorities and even social security authorities of the other member states are entitled to prove their claims; art 39 *Regulation*.

¹²⁷² *Ibid*, art 4(2).

¹²⁷³ *Ibid*, arts 5 and 7.

¹²⁷⁴ *Ibid*, art 6.

¹²⁷⁵ *Ibid*, art 8.

¹²⁷⁶ *Ibid*, art 10. It is governed by the law applicable to the contract. Whether insolvency terminates Contract of employment is matter decided by national laws of the member states.

¹²⁷⁷ The liquidator or administrator exercises his powers in the rest of the member states. This includes power to remove the debtor's assets from the other member states; art 18 *Regulation*.

¹²⁷⁸ *Ibid*, art 16 (1).

¹²⁷⁹ *Re Euro Food IFSC Ltd Supra* (n 1265).

¹²⁸⁰ Wessels "European recognition of judgments and public policy" 2009 *Corporate Rescue and Insolvency* 65.

¹²⁸¹ Art 26 *Regulation*.

¹²⁸² The opening of secondary proceeding may be requested by the liquidator in the main proceedings or any creditor; arts 16 (2) and 29 *Regulation*.

with human means and goods”.¹²⁸³ Like main proceedings, secondary proceedings are subject to national laws of every state in which the debtor has an establishment.¹²⁸⁴ In the event of current proceedings, the liquidators or administrators are required to cooperate with one another either directly or through the exchange of information, or the transfer of surplus from one jurisdiction to the other. Accordingly, the “hotchpots” rule is established to ensure equality among the creditors.¹²⁸⁵ The communication and cooperation among the liquidators of both proceedings creates unity in regard to all claims, and it symbolises the desire of the drafters to achieve “a system of international cooperation that is simple and easy to understand”.¹²⁸⁶

As previously mentioned, the EU does not attempt a substantive unification of the insolvency law of its member states; rather, it provides a framework within which the different systems can operate. It determines the jurisdiction to open insolvency proceedings, the applicable law, and its effects on other member states.¹²⁸⁷ As Europe is facing a severe economic and social crisis, plans are underway towards the modernisation of the regulation. Efforts are designed to create a new approach to business failure and insolvency. The new approach places emphasis on business rescue to help companies survive, which will help safeguards jobs, keep suppliers, and that will maximise returns to creditors.¹²⁸⁸

7.2.2 International instruments on the law of employment relations

The proliferation of international organisations, multinational corporations and group of corporations due to globalisation, has made the international aspect of employment law important. The international aspect of employment law includes human agents working for international organisations, workers working across a number of jurisdictions (such as airline pilots and crew of ships), and workers who work temporarily out of their place

¹²⁸³ Bogdan 1997 *Int. Insolv. Rev* 120 (hereinafter referred to as Bogdan).

¹²⁸⁴ Art 28 *Regulation*.

¹²⁸⁵ *Ibid*, art 20.

¹²⁸⁶ See *Re Aim undertaking Agencies (Ireland) Ltd* 2004.

¹²⁸⁷ Spedding (2008)183 (hereinafter referred to as Spedding).

¹²⁸⁸ See the “Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: A New Approach European to Business Failure and Insolvency”. European Commission, Strasbourg, 12 December 2012. Available at: http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm; accessed 1 March 2013.

of work (posted workers).¹²⁸⁹ A result of these developments is that employment relationships have been created that require regulation and control for parties involved to determine their rights and obligations, and to give them protection against the uncontrolled exercise of authority by secretariats of the international organisations for which they work.¹²⁹⁰ There are good reasons why there should be an independent system of law governing employment relations in international organisations, or why such relations should not be governed by national law or conflict law of any particular state.

According to Amerasinghe, it is to ensure that all staff, irrespective of their nationality, place of recruitment or work, be subject to identical rules. Secondly, it is to preserve the independence of the international officials and workers from national pressure, from either their own state or any other.¹²⁹¹ Since there is no universal law governing employment relations, the legitimate question that may be asked is what law governs the relationship between an employee and the administration of an international organisation of this kind, such as the SADC or the OHADA?

It has been said that international organisations fall outside the jurisdiction of national law, and as such cannot be subject to the control of states.¹²⁹² As subjects of international law, they are considered capable of creating their own internal law. The Italian Court of Cassation, overruling two lower courts, took a similar stand in regard to the International Institute of Agriculture, stating that: “The particular system of the Institute must be sufficient unto itself, both in regard to substantive rules and to rules governing the relations of its internal management such as those concerning employment”.¹²⁹³ In other words, international organisations should be able to take decisions, enact rules, and establish regulations and staff rules, which govern the functioning of the organisation. The IAT has agreed on the applicability of a system of

¹²⁸⁹ Merrett (n 1081) 1.

¹²⁹⁰ Amerasinghe *Principles of the institutional law of international organisations* (2005) 275. See also *Mendaro v World Bank*, 717 F.2d 610 at 615 (D.C Cir. 1983).

¹²⁹¹ Ibid.

¹²⁹² Ibid, 272.

¹²⁹³ See *International Institute of Agriculture v Profit* (1931) 5 AD 415.

law characterised as “internal law” to decide on disputes between international organisations and their staff.¹²⁹⁴ According to Amerasinghe, these, “principles are basics for the operation of international organisations”.¹²⁹⁵

7.2.2.1 *The internal law as the governing law of the World Bank*

The WB disregards the control of states over international organisations, or the applicability of national law governing conditions of employment arising between the Bank and its staff. In de Merode recently, the World Bank Administrative Tribunal (WBAT) stated:

The Tribunal, which is an international Tribunal, considers that its task is to decide internal disputes between the Bank and its staff within the organised legal system of the World Bank and that it must apply the internal law of the Bank as the law governing the conditions of employment.¹²⁹⁶

In de Merode, the WBAT accepted the view that particular labour law principles and rules of particular states were not *per se* part of the legal system applicable to the organisation.¹²⁹⁷ The Bangladesh case renders testimony to the undesirability of domestic courts sitting in judgment over disputes between the WB and its staff.¹²⁹⁸ In the Bangladeshi case, the WB refused to confirm the probationary appointment of Ismet Zerin Khan. Khan challenged the WB’s decision on the grounds of abuse of discretion and failure of apply the staff rules. To make matters worse, the WB advertised for recruitment to the disputed position while Khan’s application was pending review in the appeals committee. This led Khan to file a case in the Bangladeshi court of Dhaka. The WB filed an application for rejection of the complaint on the grounds that it enjoyed immunity from legal process, and therefore could not be sued in Bangladesh. This did

¹²⁹⁴ See Aglion, Judgment 56 [1954], and Waghorn, ILO Administrative Tribunal Judgment 28 [1957] 6.

¹²⁹⁵ Amerasinghe (2005) 275 (hereinafter referred to as Amerasinghe).

¹²⁹⁶ See the de Merode, WBAT Reports [1981], Decision 1 at 12-13. See also Amerasinghe, 279.

¹²⁹⁷ Amerasinghe (n 1295) 39-40.

¹²⁹⁸ See International Financial Institutions WATCH Bangladesh, Bangladesh Working Group on International Finance and Trade Organisations, the WB and the Question of Immunity (September 4, 2004) available at http://www.unnayan.org/Other/IFI_Watch_Bangladesh_Vol_1%20No_1.pdf; accessed 12 May 2012).

not end the proceedings in Dhaka.¹²⁹⁹ Instead, the Dhaka court observed, that “no establishment agreement existed between the WB and Bangladesh” and that the provision of immunity was in opposition to the Constitution of Bangladesh.¹³⁰⁰ The Dhaka court ruled in favoured of Khan to the effect that Khan was entitled to be reinstated and receive arrear salaries and benefits.¹³⁰¹

The Dhaka court ignored a final decision of the WBAT and set aside an employment decision of the chief administrative officer of the WB. By ignoring the decision of the WB, the WB was confronted with two conflicting judgments. However, in *Saunoi v INTERPOL*¹³⁰² the ILO Administrative Tribunal confirmed the application of national law, but acknowledged that it must be justified and not presumed. According to the ILO Administrative Tribunal, reference can be made to municipal law under certain circumstances, such as where there is a *renvoi* to such law. It further stated that when *renvoi* are made, “they can never lead to the total submission of an international organisation to a national legal order unless the organisation ceases to be a creature of international law”.¹³⁰³

7.2.2.2 *The internal law of the EU*

Within the EU, employment relationships are based on statutes and not contract. The Brussels 1 Regulation on Jurisdiction, Recognition, and Enforcement of Judgments in Civil and Commercial Matters,¹³⁰⁴ and the Rome 1 Regulation on the Law Applicable to Contractual Obligations¹³⁰⁵ contain special rules dealing with contracts of employment, specifically on jurisdiction and the applicable law over individual contracts of employment. Both regulations are automatically binding on the member states when they join the EU. To begin with, the Brussels Regulation contains special rules on

¹²⁹⁹ Cissé *et al* *International financial institutions and global governance* (2012) 112-113.

¹³⁰⁰ *Ibid.*

¹³⁰¹ News from Bangladesh, Termination of WB Employee declared illegal: Dhaka Court, available at: <http://Bangladesh-web.com/view.php?hidRecord=321074>; accessed 12 May 2012).

¹³⁰² ILO Administrative Tribunal Judgment 1020 (1990).

¹³⁰³ Cissé *et al* (2012) 112 (hereinafter referred to as Cissé *et al*).

¹³⁰⁴ Council Regulation (EC) 44/2001 OF 22 December 2000.

¹³⁰⁵ Council Regulation (EC) 593/2008 of 17 June 2008.

jurisdiction in civil and commercial matters,¹³⁰⁶ to the exclusion of revenue, customs, or administrative matters, as well as to the status or legal capacity of natural persons, matrimonial matters, wills and succession, bankruptcy, social security and arbitration.¹³⁰⁷

The Brussels regulation does not attempt to unify the judicial organisation of member states but to provide uniform rules for determining jurisdiction. The basic principle is that jurisdiction is to be exercised by the EU country in which the defendant is domiciled, regardless of his/her nationality. In other words, the uniform rules of jurisdiction only apply to disputes in which the defendant is domiciled in a member state.¹³⁰⁸ A judgment given in an EU country is to be recognised in all EU countries without special proceedings, unless such recognition is contrary to the public policy of a country. If the defendant is not domiciled in a member state, Article 4 of the Brussels regulation provides “the jurisdiction of the court of each member state shall, subject to Articles 22 and 23, be determined by the law of that member state”. It follows from this provision that for claims brought against defendants domiciled in third party states (non-EU states), the jurisdiction is subject to the national law of the member state in which the defendant is domiciled, unless a court of a member state has exclusive jurisdiction pursuant to Articles 22 and 23 of the Regulation.¹³⁰⁹

In respect of legal persons or firms, domicile is determined by the country where they have their statutory seat, central administration, or principal place of business; while in the case of trusts, domicile is defined by the private international rules of the court considering the case.¹³¹⁰

¹³⁰⁶ Art 1 Brussels Regulation 2000.

¹³⁰⁷ See

(http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_civil_matters/133054_en.htm; accessed 5 May 2012).

¹³⁰⁸ Ibid.

¹³⁰⁹ Nuys *et al* ‘Review of the member states’ Rules concerning the “Residual Jurisdiction” of their courts in civil and commercial matters pursuant to the Brussels I and II Regulations’ General Report (2007) 12.

¹³¹⁰ See (n 1307) above.

The regulation also lays down special rules in employment related matters. Employment related matters are considered to fall within the scope of the regulation because they are regulated by public law; this is confirmed by the ECJ¹³¹¹ and the Schollosser Report on the 1968 Brussels Convention.¹³¹² The report noted that “the term ‘civil law’ includes important special subjects which are not public law, especially, for example, parts of labour law”.¹³¹³ The regulation applies irrespective of the employee (public or private).¹³¹⁴ However, before the regulation can apply, the local court must first determine whether it is a civil or commercial matter, and the domicile of the defendant. In employment related matters, jurisdiction is the court of the place where the employer and employee domicile.¹³¹⁵ If the place of domicile is outside the EU, the national rules on jurisdiction will apply.¹³¹⁶ Apart from the place of domicile, an employee may be sued in the place where he habitually works, or in the place where the business that engaged him is or was situated.¹³¹⁷

Furthermore, parties are allowed to choose jurisdiction in employment cases (party autonomy). This is however restricted for the purpose of protecting the employees. In the case of legal persons or firms, domicile is determined by the country where they have their statutory seat, central administration, or principal place of business.¹³¹⁸ For a company that is domiciled in more than one member state, the regulation uses both the statutory seat and the place where business is managed as domicile.¹³¹⁹ Although the domicile of the defendant is the determining factor for the application of the regulation, the court may use the place of the branch, agency, or other establishments if they are

¹³¹¹ See *Sanicentral GMBH v Collin* case C-25/79 [1979] ECR 3423 [3].

¹³¹² 1979, 59/72.

¹³¹³ Ibid.

¹³¹⁴ See *Moore v President of the Methodist Conference* UKEAT/0219/10/DM wherein Underhill J referred to the fact “perceptions were changing about the appropriate scope of employment rights”.

¹³¹⁵ Arts 19 (1) and 20 (1) Brussels Regulation.

¹³¹⁶ Merrett (n 1081) 87.

¹³¹⁷ Arts 19 (2) (a) and 19 (2) (b) Brussels Regulation.

¹³¹⁸ Ibid, art 60. The place of central administration is the place of operation functions while the principal place of business is where the company focuses on executive functions; see *Ministry of Defense and Support of the Armed Forces for the Islamic Republic of Iran v FAZARUATM Ltd* [2007] EWHC 1042.

¹³¹⁹ Ibid, art 60 (1) (a).

located in a member state,¹³²⁰ although the presence of a branch within the EU does not suffice for the application of the Regulation.¹³²¹ In *Skekar v Satyam Computer Services Ltd*,¹³²² an Indian national residing in England entered into a contract to work for an Indian company located in England (branch). In the event of a dispute, the regulation was not applied, because India is outside the EU.

Once jurisdiction is determined, the choice of law to decide the merit of the dispute must be decided. The Rome Regulation lays down uniform rules for determining the law applicable to contractual obligations in the event of conflict of laws. Like the Brussels Regulation, it does not apply to revenue, customs, or administrative matters, or to evidence and procedure.¹³²³ It also does not attempt the unification of the laws of the member states; rather, it contains special rules for employment contracts. Article 6 (1) gives parties the option to decide on the choice of law.¹³²⁴ In the absence of such liberty, the contract shall be governed by the law of the country in which the employee habitually works or the place of business (if the employee does not habitually work in any of the member states).

The EU issued a directive regarding the protection of employees in the event of their employer's insolvency.¹³²⁵ In contrast to the International Labour Organisation (ILO), the EU directive provides for the establishment of a guarantee institution to secure employees' outstanding claims relating to their employment, irrespective of the duration of the contract of employment, or the employment relationship. It accordingly gives member states the right to set ceilings on the payments made by the institution. By the same token, it also issued directives regarding the termination of employment and the safeguarding of employees' rights in the event of transfers of undertakings, businesses,

¹³²⁰ Ibid, art 18 (2).

¹³²¹ Merrett (n 1081) 90.

¹³²² [2005] ICR 737.

¹³²³ See (n 1320) above.

¹³²⁴ Art 3 Rome Regulations 2008.

¹³²⁵ Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the Protection of employees in the event of the insolvency of their employer (Codified version) (Text with EEA relevance).

or parts of undertakings or businesses.¹³²⁶ Transfer of undertakings is not a ground for dismissal, and where it occurs for economic, technical, or organisational reasons, employment contracts pass from the previous employer to the new employer.¹³²⁷ This does not apply to transfer during bankruptcy proceedings instituted with the view to liquidate assets. Under the directive regarding the termination of employment, employers considering collective dismissal are required first to consult with workers representatives, with the goals of reaching an agreement.

7.2.2.3 *International Labour Organisation Instruments*

The ILO is a specialised agency of the UN that brings together representatives of governments, employers, and workers in its executive bodies. The benefit of this tripartite structure of the ILO is that it gives equal voices to workers, employers, and governments in the design of labour standards and shaping of policies and programs.¹³²⁸ The ILO's creation in 1919 by the treaty of Versailles arose from the belief that "universal and lasting peace can be accomplished only if it is based on social justice"¹³²⁹ and according to Juan Somavia, director-general of ILO, "working for social justice is our assessment of the past and our mandate for the future".¹³³⁰ The ILO acknowledges the differences in levels of development that are, to a certain extent, linked to the conditions and level of protection of labour.

The purpose of the ILO is not "to achieve uniformity in the level of social protection; [rather], it is simply to place social progress into a relationship with the economic progress expected from the liberalisation of trade and globalisation [in order to ensure a proper international competition]".¹³³¹ To realise this, the ILO has promulgated a number of conventions and recommendations all designed for the benefits of all classes in the

¹³²⁶ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.

¹³²⁷ Ibid.

¹³²⁸ ILO 1919 <http://www.ilo.org/gobal/about-the-ilo/history/lang-en/index.htm>; accessed 12 April 2013.

¹³²⁹ See the Preamble of ILO Declaration of Philadelphia 1994 available at: <http://www.ilo.org/ilolex/english/iloconst.htm>; accessed 20 August 2011.

¹³³⁰ Ibid.

¹³³¹ See <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/law/lablaw.htm>; accessed 20 August 2011.

society.¹³³² For the purpose of the present discussion, the ILO's underlying legal instruments are concisely presented. The ILO has three instruments: the constitution, convention, and recommendations. The constitution contains provisions relating to the functioning of the organisation and general principles, which are today regarded as a direct source of law. Second to the constitution are the ILO conventions, which create binding obligations for states upon ratification.¹³³³ Ratifying states are expected to take measures necessary to make effective the provisions of such conventions, custom, administrative measures or, in certain circumstances, collective agreements.¹³³⁴ Although the ILO conventions are not ranked in order of importance, a hierarchy can be discerned in the following order.¹³³⁵

A notable feature of the ILO conventions is that they upheld the principle of flexibility in the sense that governments have the right to decide the scope of the conventions it shall ratify or exclude from the scope.¹³³⁶ Recommendations however, are not capable of ratification and thus, not binding on member states. Added to this is the issuance of declaration by the ILO, the most significant being the Declaration on Fundamental

¹³³² Ibid. .

¹³³³ See http://actrav.itcilo.org/actrav-english/telearn/global/ilo/law/lablaw.htm#ILO_instruments.

¹³³⁴ Art 2 ILO Constitution 1 April 1919. Available at: <http://www.unhcr.org/refworld/docid/3ddb5391a.html>; accessed 20 August 2011.

¹³³⁴ Van Niekerk *et al Law @ work* (2008) 20.

¹³³⁵ The order of the ILO Conventions:

- Freedom of Association and Protection of the Rights to Organise Convention. This convention emphasises on the rights of workers and employers to form and join organisations without any prior intervention 1998 (No.87).
- Right to Organise Collective Bargaining Convention. This convention ensures equal rights for workers and their employers in the determination of labour related matters 1949 (No.98).
- Forced Labour Convention. It provides for suppression of forced and compulsory labour in all its forms except in emergencies such as war, fires and earthquakes 1930 (No. 29).
- Abolition of Forced Labour Convention 1957 (No.105).
- Discrimination (Employment and Occupation) Convention. This convention calls for elimination of discrimination in access to employment, training and working conditions on grounds of race, colour or religion 1958 (No.111).
- Equal Remuneration Convention provides for equal pay for men and women for work of equal value 1951 (No.100).
- Minimum Age Convention emphasises on the abolition of child labour 1973 (No. 138) and
- Protection of Workers' Claims (Employer's Insolvency) Convention 23 June 1992 (No. 173).

¹³³⁶ Hoe <http://actrav.itcilo.org/actrav-english/telearn/global/ilo/guide/hoelim.htm> accessed 21 August 2011.

Principles and Rights at work.¹³³⁷ The declaration is an affirmation of member states' obligations to workers' and employers' fundamental rights.

The following special features of the ILO can be observed: firstly, the ILO's pragmatic reliance on principles of voluntary participation, transparency, and its tripartite social dialogue and co-operation for capacity building; and, secondly, the ILO does not have a punitive enforcement mechanism to force states to comply, rather, it has a supervisory mechanism designed to monitor the application of ratified conventions in national law and practice. In this regard, each party state is required to submit reports on measures taken to implement ratified conventions.¹³³⁸ According to Gravel et al,¹³³⁹ "this permanent supervisory mechanism offers an opportunity to come up, in due time, with a global assessment of the extent to which the crisis response measures correspond to the international commitments of member States under ratified Conventions".

In addition, the ILO focuses only on the employment relationship between employers and workers in the formal sector, and not of workers in the informal sector. The exclusion of workers in the informal economy from the ILO scope does not mean they are not important; the ILO's fundamental conventions on freedom of association¹³⁴⁰ explicitly recognise the rights of workers in the informal sector to freedom of association and collective bargaining. Thus, workers in the informal economy have the right to organise and engage in collective bargaining (where there is an employer).¹³⁴¹ This includes the right to freely establish and join trade unions of their choice in furtherance of their occupational interests. However, progress has been made in developing a conceptual framework of employment in the informal sector.

The ILO underscores the importance of the protection of workers' claim in the event of insolvency of their employer, and gives states the opportunity to ratify the convention

¹³³⁷ It was adopted at the 86th ILC 1998.

¹³³⁸ Gravel et al "A legal perspective on the role of international labour standards in rebalancing globalisation" 8.

¹³³⁹ Ibid.

¹³⁴⁰ Number 87 and 98.

¹³⁴¹ Van Niekerk et al (2008) 7-8 (hereinafter referred to as Van Niekerk et al).

governing the subject matter.¹³⁴² It imposes on ratifying states the obligation to accept either Part II that provides for the protection of workers claims by means of a privilege, or Part III that provides for the protection of workers' claims by a guaranteeing institution.¹³⁴³

The 1982 convention regarding termination of employment was issued to cover envisaged dismissals. Under the convention (Part 11, Article 11), employers are required to provide at the point of termination, reasonable notice of such termination, or compensation for the lack of notice, and accordingly seeks direct participation of the workers' representative in employment termination in the event of insolvency, restructuring, and downsizing.

7.2.3 *International instruments on companies*

This section appraises the effort of the EU in the harmonisation of company law. To date, the 28th company law regime¹³⁴⁴ provides for three company forms: the Europe Economic Interest Group,¹³⁴⁵ the European Co-operative Society,¹³⁴⁶ and the European Public Company,¹³⁴⁷ the forms of which are to be adopted by the member states. Opinions are divided on the idea of a separate company law regime in Europe. While some support a separate company law regime for limited liability companies as a supplement to the 27 member states national regimes, opponents of a separate company law regime are of the view that European company law should be an essential part of national law for it to function properly.¹³⁴⁸

For those who are irresolute, the creation of a separate company law regime should be based on practical evidence of the need by businesses. This notwithstanding, there is

¹³⁴² See (n 1337) above.

¹³⁴³ Art 3 Protection of Workers' Claims (Employer's Insolvency) Convention.

¹³⁴⁴ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

¹³⁴⁵ Council Regulation (EC) No. 2137/58 of 25 July 1985.

¹³⁴⁶ Council Regulation (EC) No. 1435/2003 of 22 July 2003.

¹³⁴⁷ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).

¹³⁴⁸ Report of the Reflection group on the 'Future of EU Company Law' 29.

no uniform company law yet, but minimum standards applicable to companies within the community exist. Member states continue to operate separate company law regimes, but are obliged to align their companies' acts in light of the minimum standards. With respect to the formation of a company in the community, some member states require the presence, that is, registered office of a company at the time of formation, while some member states require the company's location, that is, main administrative location (real seat).¹³⁴⁹ In spite of these differences, Article 49 of the treaty establishing the EU provides for free establishment of companies without a change in the company's nationality (registered office). Basically, companies are required to maintain their nationality (real seat or registered office) within the territory of their home states.

Like the Insolvency Regulation, there are also plans to modernise the company law and corporate governance with a view to establishing a modern legal framework for more engaged shareholders and sustainable companies.¹³⁵⁰ The initiative includes:¹³⁵¹

- enhancing transparency between companies and investors;
- encouraging long-term shareholder engagement;
- improving the framework for cross-border operation of companies; and
- launching a process of codification of most company law directives.

7.2.4 International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts

As economic activities become increasingly global, there is a need for strong incentives for the law to follow the same pattern.¹³⁵² A significant development of a modern *lex mercatoria* that seeks to follow the same pattern is the UNIDROIT Principles of International Commercial Contracts. This document is the effort of well-respected contract and international trade specialists from the civil, common, and socialist legal

¹³⁴⁹ Ibid.

¹³⁵⁰ The Commission Communication "Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies" of 12 December 2012. Available at: http://ec.europa.eu/internal_market/company/modern/index_en.htm#actionplan2012; accessed 02 March 2013.

¹³⁵¹ Ibid.

¹³⁵² Mancuso (n 2) 3.

systems in different international countries.¹³⁵³ It is an important document that seeks to maintain a delicate balance between the concepts of civil and common law. The Principles set forth general rules of international contracts that shall apply:

Firstly, the Principles will be applied when parties have agreed that their contract be governed by the general principles of law. They may also be used to interpret or supplement international uniform law instruments or when it proves impossible to establish the relevant rule of the applicable law and may serve as a model for national and international legislators or law-makers in drafting new legislation in commercial contracts.¹³⁵⁴

The Principles set forth some of the fundamental concepts underlying international commercial contracts in the modern world. As one experienced American lawyer has commented:¹³⁵⁵

The great importance of the Principles is that the volume exists. It can be taken to court, it can be referred to page and article number, and persons who are referred to its provisions can locate and review them without difficulty. This alone is a great contribution towards making *lex mercatoria* definitive and provable.

The UNIDROIT Principles are autonomous in character in that they permit issues that have not been addressed to be resolved in harmony with their basic tenets.¹³⁵⁶ It also balances or reconciles the different legal traditions in a creative and beneficial method, to the benefit of the international business community. More so, it is widely accepted because of its accessibility in many languages.¹³⁵⁷

¹³⁵³ Tetley "Mixed jurisdictions: Common law vs. Civil law (Codified and uncoded)" 1999 *Uniform Law Review* 39.

¹³⁵⁴ Ibid. It should be noted that the Principles have been the source of inspiration in the Netherlands Civil Code 1992, the Québec Civil Code 1994, and the new Civil Code of the Russian Federation. It has also been referred to in the final Report of the Commission for the Revision of the German Law of Obligations 1992 and in the drafts of the Civil Code of Lithuania and the Czech Republic.

¹³⁵⁵ See Seldon "Lex mercatoria in European and U.S trade practice: Time to take a closer look" 1995 *Annual Survey of International and Comparative Law* 122.

¹³⁵⁶ See Boele-Woelki "The UNIDROIT Principles of International Contracts and the Principles of European Contract Law: How to apply them to international contracts" 1994 *Uniform Law Review* 658. See also the decision of the Cour d'Appel de Grenoble, 24 January 1997 where the Principles were used to determine the rate of interest to which a creditor of a debt due under an international sale of goods contract was entitled where the debtor delayed in making payment, in the absence of a specific rule on the point in the Vienna Convention on the International Sale of Goods 1980.

¹³⁵⁷ The Principles are available in Chinese, English, French, Italian, Portuguese, Russian, Slovak and

7.2.5 WTO dispute settlement system

It has been argued that a law or agreement is not worth much if its signatories fail to comply with its obligations.¹³⁵⁸ The lack of compliance by states underscores the high importance attached to an effective and binding dispute settlement system that helps to prevent the detrimental effect of unresolved international trade conflicts, and mitigates the imbalance between stronger and weaker players by having their disputes settled on the basis of rules rather than having powers determine the outcome.¹³⁵⁹ A significant development in this respect is the WTO dispute settlement system.

The WTO provides “a common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments included in the annexes to this agreement”.¹³⁶⁰ To this effect, a unique dispute settlement mechanism was created in 1995 as part of the WTO Agreement during the Uruguay Round. It is contained in the Understanding on Rules and Procedures Governing the Settlement of Disputes, and is commonly referred to as the Dispute Settlement Understanding (DSU).¹³⁶¹ In respect of a dispute settlement, the DSU provides for the establishment of ad hoc panels and a strong standing appellate body to assist the dispute settlement body. It also provides for the creation of a secretariat that assists with the administration of dispute settlement in the WTO.¹³⁶²

The dispute settlement system is designed to resolve disputes relating to WTO agreements¹³⁶³ in order to make the trading system more secure and predictable.¹³⁶⁴ Unlike the SADC Tribunal, only WTO members have access to the dispute settlement mechanism. This is to the exclusion of private individuals, companies, and NGOs.¹³⁶⁵ However, some member governments have adopted internal legislation under which

¹³⁵⁸ Spanish and has been translated into Arabic, Bulgarian, Czech, Flemish and Korean.
¹³⁵⁹ World Trade Organisation Secretariat *A handbook on the WTO dispute settlement system* (2010) 1.
¹³⁶⁰ Ibid.
¹³⁶¹ Art 11.1 WTO Agreement establishing the WTO.
¹³⁶² WTO Secretariat (2010) 3.
¹³⁶³ Art 27 of the Dispute Settlement Understanding (DSU).
¹³⁶⁴ WTO agreement includes the various agreements such as the General Agreement on Tariffs and Trade and the General Agreement on Trade in Services negotiated by the WTO members.
¹³⁶⁵ World Trade Organisation Secretariat (2010) 3 (hereinafter referred to as WTO Secretariat).
¹³⁶⁵ Ibid,8-9

private parties can petition their governments to bring WTO disputes.¹³⁶⁶ The dispute settlement mechanism is compulsory for, and binding on all members and disputes arising under the WTO Agreement.

Disputes arise when a member state adopts a trade policy measure that is inconsistent with the obligations set out in the WTO agreement.¹³⁶⁷ When this happens, any aggrieved member state may challenge the measure by invoking the procedure and provisions of the DSU. If parties cannot reach a mutually agreed solution,¹³⁶⁸ then the matter is referred to an independent body (the panel) for adjudication. The establishment of the panel is upon the complainant's request; however, the dispute settlement body may, by consensus, object to the establishment of the panel (negative consensus).¹³⁶⁹ This of course will not happen as long as the complainant is unwilling to join in that consensus.¹³⁷⁰

After the hearings of the parties and assessment of relevant factual questions and legal issues, the panel drafts a report composed of two main parts: the "descriptive part" and the "findings".¹³⁷¹ The panel report is not adopted if it is appealed, but if there is no appeal the dispute settlement body is obliged to adopt the report, unless there is a "negative" or reverse consensus by the dispute settlement body against the adoption, which has not occurred in the WTO practice to date. When the panel concludes that there is a violation, it may, at the same time, recommend the responding member to make an adjustment, that is, to compensate the complainant with an alternative trade opportunity to make up for the impaired benefits.¹³⁷² It may also recommend the responding member to bring the challenged measure into conformity with the WTO

¹³⁶⁶ See Section (s) 301 of the United States Trade Act 1974. See also the Trade Barriers Regulation of the European Communities.

¹³⁶⁷ *Ibid*, 2.

¹³⁶⁸ Consultation is the first stage of formal dispute settlement; art 4 DSU. Parties may depart from the consultation process under art 25.2 DSU if they resort to arbitration as an alternative means to dispute statement; see WTO Secretariat (n 1364) 95-96.

¹³⁶⁹ Art 6 DSU.

¹³⁷⁰ WTO Secretariat (n 1364) 49.

¹³⁷¹ Arts 14.1 and 14.2 DSU.

¹³⁷² WTO Secretariat (n 1364) 58.

law,¹³⁷³ failing which the complainant may resort to temporary measures (compensation, or the suspension of WTO obligations).¹³⁷⁴

Compensation here does not necessarily mean monetary payment but rather the offering of a benefit such as tariff reduction equivalent to the benefit that the responding member has nullified or impaired by applying its measure.¹³⁷⁵ The importance of the WTO dispute settlement system is that it provides a mechanism through which members can ensure that their rights are enforced. It also provides a forum for parties to settle their disputes (for the complainant to lay his complaint and the defendant to defend himself if he disagrees with the claim raised by the complainant). According to the WTO Secretariat, this serves to preserve the members' rights and obligations under the WTO agreement.¹³⁷⁶

7.3. Conclusion and significance of the international instruments for the SADC

With the emergence of international trade, efforts towards the international unification of law have taken the form of both binding and non-binding legal instruments. In this chapter, the author discussed the efforts of some international and regional organisations to develop conflict of law rules and their importance to the SADC. Taking into consideration the need for a uniform commercial law structure in the SADC and the importance of uniform commercial solutions to multi-jurisdictional issues, it would be desirable for the SADC to develop its own uniform rules or legal instruments that suits its needs by looking at other international instruments. Though the instruments provide important insights into the development of a uniform commercial law structure, the author does not lose sight of other international instruments.

The international instruments discussed above have helped countries to harmonise conflict of laws regarding which law and court should assume international jurisdiction to open insolvency proceedings and employment disputes. They have also helped to

¹³⁷³ Art 19.1 DSU.

¹³⁷⁴ WTO Secretariat (n 1364) 80.

¹³⁷⁵ Art 22.2 DSU.

¹³⁷⁶ *Ibid*, art 3.2 DSU.

reconcile the divergent legal traditions prevalent among countries in the development of commercial contracts.¹³⁷⁷ Similarly, the international instruments will help the SADC to reconcile its divergent legal systems and to reduce or eliminate the conflicts between states, by creating common rules or standards that take precedence over national laws of the member states. The adoption of uniform or harmonised legal instruments in dealing with conflict of law issues will make it easier for the SADC to determine the applicable law, and for courts to assume jurisdiction in the event of cross-border disputes.

In addition, it will help to minimise fraud committed by debtors.¹³⁷⁸ It will also help the SADC to expedite the determination of cases and save time and resources that would otherwise be used to enforce foreign judgments in foreign countries (other member states).¹³⁷⁹ From the above, it is apparent that the SADC needs uniform rules that regulate the kind of problems generated by conflict of laws. It also needs a strong and binding dispute settlement system through which economic operators can enforce their rights in accordance with SADC rules.

With the experiences of other regions, and help from international instruments, it is viable and practically useful for SADC states to take into account modern theory and the practices of transnational commercial law discussed above. This of course is to ensure that its uniform commercial law is in line with international best practices. In view of the above, the SADC should adopt a uniform commercial law which is directly applicable and binding in the member states. In other words, the law should constitute an internal legal order of the member states, and must take precedence over national commercial laws.

With respect to company law, the SADC should create forms of companies that can be incorporated in any of the member states. The most common forms of business entities

¹³⁷⁷ See the OHADA uniform Act on Contract. The drafters drew inspiration from the UNIDROIT Principles of International Commercial Contracts. See Date-Bah 2008 *Uniform Law Review* 217-222.

¹³⁷⁸ Sayi (n 567) 29-30.

¹³⁷⁹ Ibid.

in the SADC are the public and private limited companies, which correspond largely to those in francophone African countries, in particular OHADA countries, where the most common types of business entities are the SA and the SARL.¹³⁸⁰ The similarities in the corporate forms make it less difficult to reach consensus on the corporate framework. Taking into account the similarity in the corporate forms, the corporate framework should provide for free establishment of a company without change of nationality (registered office). In other words, companies should be required to maintain their nationality irrespective of their place of registration.¹³⁸¹

Insolvency law should be adopted in light of the instruments discussed above. Firstly, the insolvency framework of the SADC must specify the commencement standard because it is instrumental to identifying debtors who can be subjected to insolvency proceedings (balance sheet or the cash flow criteria).¹³⁸² Unlike the Model law and the EU Regulation, the insolvency law must be uniform in specifying the competent jurisdiction and the applicable law in order to avoid conflict and ensure uniformity. In so doing, the SADC may draw inspiration from OHADA.¹³⁸³ The insolvency framework should be protective of workers claims in the event of insolvency of their employers by either creating a guarantee institution as with the EU¹³⁸⁴ or grants employees' privilege.¹³⁸⁵

The labour law should be applicable to employees wherever they might be located in the region. With respect to jurisdiction for the settlement of labour disputes, it should be the place where the employee is domiciled, habitually works or place of location of the business which engages the employee.¹³⁸⁶ Most importantly, an independent supervisory and monitoring mechanism should be entrenched to ensure accountability on the part of the member states.¹³⁸⁷ When this is done, the SADC will be a lucrative

¹³⁸⁰ Ch 4 paras 4.6 above.

¹³⁸¹ Paras 7.2.3 above.

¹³⁸² See paras 7.2.1 above.

¹³⁸³ Ch paras 3.3.2 above.

¹³⁸⁴ Paras 7.2.2.3 above.

¹³⁸⁵ Ibid, 7.2.2.2 above

¹³⁸⁶ Ibid.

¹³⁸⁷ Ibid, 7.2.5 above.

community that will attract both local and foreign investors in any part of the community. Above all, there will be free flow of goods, natural persons and legal persons within the community.

CHAPTER 8: Policy Considerations and Recommendations for the Development of a Uniform Commercial Law Structure in the SADC and Improvement of the Current SADC Structure

8.1 Introduction

This thesis shows that diversity of African laws is a major obstacle to Africa's economic development. This is because it impairs intra-regional and extra-regional trade between African states and causes confusion over which law would be applicable.¹³⁸⁸ It is submitted that this situation does not bode well for a continent that is committed to promoting economic integration and alleviating poverty. The author also maintains that as long as this diversity in African laws remains, there will be legal difficulties in terms of which laws and which forum would govern any dispute that might arise.¹³⁸⁹ With this, the thesis raises the question as to what efforts African countries are making or have made towards resolving the problem in respect of the diversity of laws.¹³⁹⁰ African countries have devoted energy and resources towards removing the economic and political obstacles to development, but have not exhibited the same commitment towards the development of uniform commercial law rules.¹³⁹¹

In fact, very little has been done towards the development of a uniform commercial law structure among African countries. Against this background, the author sought to examine the efforts of African regional economic integration schemes towards the development of a uniform commercial law structure using OHADA and the SADC as comparative case studies. Comparatively, OHADA adopts a uniform commercial law approach while the SADC does not.¹³⁹² Having said this, the question arises: Is there a need for the development of a uniform commercial law structure in the SADC? The author answers in the affirmative for a number of reasons, as discussed in chapter 4 of

¹³⁸⁸ Ch 1 para 1.1 above.

¹³⁸⁹ *Ibid.*

¹³⁹⁰ *Ibid.*

¹³⁹¹ *Ibid.*

¹³⁹² Ch 3 and 4 above.

this thesis.¹³⁹³ As a result, several international conferences have been convened to consider the modernisation and harmonisation of the business laws in the SADC.¹³⁹⁴

The core of the view expressed in this thesis is that there is the need for the development of a uniform commercial law structure in the SADC, but does not support a single model on the development of a commercial law structure in the SADC. Rather, it examines the effort of OHADA in the harmonisation of the commercial laws of its member states,¹³⁹⁵ the establishment of supranational institutions,¹³⁹⁶ and other regional bodies¹³⁹⁷ and international instruments in order to draw and adapt useful lessons for the SADC.¹³⁹⁸ As Mazrui observed, “Africa must stand ready to selectively borrow, adapt, and creatively formulate its strategies for planned development”.¹³⁹⁹ The thesis also recognises the need for an improvement of the current SADC structure.¹⁴⁰⁰

The development of unified rules for member states is an evolutionary process¹⁴⁰¹ that requires a great deal of time and effort. To illustrate this, it took the EU 26 years to implement the directive of Equal Pay for Men and Women.¹⁴⁰² Manuel Gonzales advised that:

It is not enough to have strong motivation at the beginning. The commitment must be sustained because integration is a long-term process. More than 40 years have passed since the European integration process began and it is only today that we are talking about the completion of a single market and the abolition of national borders ...¹⁴⁰³

As in the words of President Masire, “[The SADC’s] task is not a task that will be completed this year or the next. When you are charting the future, your time frame is

¹³⁹³ Ch 4 paras 4.4 above.

¹³⁹⁴ See (<http://www.commerciallaw.uct.ac.za/usr/commercial/news/callforpapers.pdf>; accessed 12 May 2012).

¹³⁹⁵ Ch 2 above.

¹³⁹⁶ Ch 3 paras 3.2 above.

¹³⁹⁷ Ch 6 above.

¹³⁹⁸ Ch 5 paras 5.3 and ch 7 above.

¹³⁹⁹ Mazrui(n 903) above.

¹⁴⁰⁰ Ch 4 and 5 above.

¹⁴⁰¹ Boraine and Van Eck (n 744) 269.

¹⁴⁰² The directive was signed in 1975 but only implemented in 2001.

¹⁴⁰³ Proceedings of the 1992 Southern African Development Coordination Conference (SADCC) Annual Consultative Conference.

flexible. But we will stick to the task, and we will maintain our faith, however long it may take”.¹⁴⁰⁴ This is the challenge the SADC will face in creating unified commercial legislation for the region.¹⁴⁰⁵ In the words of President Nujoma, “the path to growth and prosperity of the region will not be an easy one; it is fraught with obstacles and tough, and at times, perhaps, painful decisions will have to be made”.¹⁴⁰⁶ Keay made a good point in support of this contention when he said, “To draft clear provisions is not an easy task, but this fact alone should not cause legislatures to eschew the idea of unified legislation”.¹⁴⁰⁷

While there are many hurdles to be overcome, such as persuading member state governments to give their support; knowledge of which areas of laws can be handled by common provisions, and those that can be subject to separate provisions; the preparation and introduction of a unified legislation is possible and workable.¹⁴⁰⁸ The primary focus of this chapter is to discuss some elements to be considered in the development of a uniform commercial law structure, and the improvement of the current SADC structure.

8.2 Policy consideration and strategy

The debate on the enactment of a unified commercial legislation concerns the method to establish such an approach and the form of the legislation. Smits distinguishes between the centralist and the non-centralist method of creating uniformity. According to him, the traditional centralist method creates uniformity by way of a binding treaty: a method he argues had not been very successful in the field of private law.¹⁴⁰⁹ The non-centralist method establishes uniformity by way of principles that serve as a model.¹⁴¹⁰ In order to warrant a higher degree of legal certainty, transparency, and predictability, the provisions of the unified legislation should be contained within a legal framework (treaty) that actually imposes a duty of adherence on the member states. Such a

¹⁴⁰⁴ Record of the SADCC Summit, July 1984.

¹⁴⁰⁵ Ibid.

¹⁴⁰⁶ Record of the SADCC Summit, August 1992.

¹⁴⁰⁷ Keay 1999 *De Jure* 79 (hereinafter referred to as Keay).

¹⁴⁰⁸ Ibid, 73.

¹⁴⁰⁹ Smits *The contribution of mixed legal systems to European private law* (2001) 2.

¹⁴¹⁰ Ibid.

framework would facilitate member states' understanding of their own and shared interests, information gathering, and exchange of ideas.¹⁴¹¹ The adoption of a treaty will serve as an indication that the states are willing to integrate their economies and to comply with the treaty provisions.

Unlike the SADC Treaty,¹⁴¹² the provisions of the treaty and those of the unified legislation should be directly applicable in the member states.¹⁴¹³ This eliminates any possibility of escape from international obligations by contracting states, and thus creates a sense of unity of purpose among the contracting states. The fear of non-compliance is one of the major challenges that, according to many, stifle potentially beneficial co-operation between states. The *Mike Campbell v Republic of Zimbabwe*¹⁴¹⁴ case is a notable example. According to Voeten,¹⁴¹⁵ non-compliance is not a wilful act, but arises from a number of issues, some of which include the complexity of implementing the agreement; the ambiguity and indeterminacy of treaty language; limitations on the capacity of parties to carry out their undertakings; and temporal dimensions of social, economic and political changes contemplated by regulatory treaties.¹⁴¹⁶

It is submitted that significant co-operation among member states is difficult to maintain without strong enforcement procedures.¹⁴¹⁷ Regrettably, the SADC Treaty does not provide for any possible sanctions that may be imposed against a defaulting state.¹⁴¹⁸ Of course, including such a provision in the SADC Treaty would be a good thing, and would have the aim of promoting compliance with the objectives set by the SADC and

¹⁴¹¹ Brunee and Toope "Environmental security and fresh water resources: Ecosystem regime building" (1997) 91 *American Journal of International Law* 26. The authors suggest and urged the use of framework convention.

¹⁴¹² Ch 4 paras 4.1.1

¹⁴¹³ Ch 3 paras 3.3 above. See also Ch 5 paras 5.3.2 above.

¹⁴¹⁴ SADC (T) 2 2007. Ch 4 paras 4.2.8.2 above.

¹⁴¹⁵ Voeten, *Regional judicial institutions and economic cooperation: Lessons for Asia*, Asian Development Bank Working Paper Series on Regional Economic Integration (2010) 18.

¹⁴¹⁶ Chayes and Chayes *The sovereignty: Compliance with international regulatory agreements* (1998) 10. See Kacowicz "Compliance and non-compliance with international norms in territorial disputes: The Latin American record of arbitration" in Benvenidti E and Hirsch M (eds) *The Impact of International Law on International Co-operation: Theoretical Perspectives* (2004) 198-199.

¹⁴¹⁷ Abbott and Snidal "Pathways to international cooperation" in Benvenidti E and Hirsch M (eds) *The Impact of International Law on International Co-operation: Theoretical Perspectives* (2004) 58.

¹⁴¹⁸ Ch 4 above and Art 33 SADC Treaty.

the tribunal's decisions. The treaty should contain enforcement mechanisms with the aim of ensuring compliance of treaty obligations. Brunee¹⁴¹⁹ defined enforcement as "the act of compelling compliance with a law". To do so, inspiration may be drawn from the WTO.¹⁴²⁰ Even though these sanctions will be applied at the cost of the people, they are necessary for the continuity of the organisation. Among other sanctions, tariffs may be imposed, pressure may be exerted on the non-complying state to comply with the treaty provisions,¹⁴²¹ the member state concerned could be temporarily suspended from the SADC, and all development aid could also be suspended.¹⁴²² The following sanctions could be imposed: a complete or partial interruption of economic relations, and other means of communication, as well as severance of diplomatic relations.¹⁴²³

The COM should serve as a "guardian of treaties" responsible for making sure that the provisions of the treaty, the unified legislation provisions of the commercial laws and acts of the various institutions are properly applied in all the member states.¹⁴²⁴ Like the European Commission, the COM should be empowered to bring enforcement proceedings before the SADC tribunal against non-complying states.¹⁴²⁵ In addition, information regarding the behaviour of other states, party to the arrangement should be provided. This may well encourage other states to comply with agreed rules (assurance statement). Such information may be gathered from past dealings.¹⁴²⁶

The SADC Treaty should also indicate the nature and effect of the legal instruments adopted. This omission, as earlier indicated, "creates a certain amount of legal

¹⁴¹⁹ Brunee 'Enforcement mechanisms in international law and international environmental law' 3 (http://www.law.utoronto.ca/documents/brunee/BrunneeEnforcementMechanismsInt_llaw.pdf; accessed 12 April 2011) (hereinafter referred to as Brunee).

¹⁴²⁰ Ch 7 paras 7.2.5 above.

¹⁴²¹ Ibid.

¹⁴²² See the Economic sanctions against Madagascar at: [http://www.un.org/apps/news/story.asp?NewsID=39117&Cr=Madagascar&Cr1](http://www.un.org/apps/news/story.asp?NewsID=39117&Cr=Madagascar&Cr1;); accessed 9 November 2011; arts 41 of the UN Charter and 22 of the Rules and Procedures governing the settlement of dispute; Annex 2 of the WTO Agreement available at: http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#22; accessed 9 November 2011.

¹⁴²³ Art 41 UN Charter 1945.

¹⁴²⁴ Cuthbert (2009) 12 (hereinafter referred to as Cuthbert).

¹⁴²⁵ Ch 6 paras 6.3.2.3 above.

¹⁴²⁶ Mosche "Compliance with international norms in the age of globalisation: Two theoretical perspectives" in Benvenidti E and Hirsch M (eds) *The Impact of International Law on International Co-operation: Theoretical Perspectives* (2004) 169-175.

uncertainty as to the very nature of the SADC law itself".¹⁴²⁷ As mentioned earlier, the AEC Treaty not only specifies the relevant bodies empowered to adopt legal instruments,¹⁴²⁸ but also specifies the effect of decisions and regulations of the AU institutions on the member states.¹⁴²⁹ The approach taken by the EU, OHADA, and the AU is commendable, as "it ensures legal certainty of the legal regime".¹⁴³⁰ Thus, the SADC might consider adopting a similar approach in the transformation of its institutions and the development of uniform commercial laws.¹⁴³¹

Legal diversity hinders deeper integration.¹⁴³² With the differences in SADC legal systems,¹⁴³³ one may ponder the possibility of creating sophisticated and detailed commercial rules. It cannot be denied that diverse legal traditions constitute a challenge, but it is possible to overcome obstacles and the EU is an excellent example of overcoming such challenges.¹⁴³⁴ However complex the integration of the major systems within the SADC might be, it can be overcome. Another major consideration would be the degree of integration of the legal systems. Should it concern only substantive law, or should it also consider the methodology and the structure?¹⁴³⁵ It is proposed that it should concern the substantive law, the methodology and the structure with the intention of creating coherence in the uniform rules. The experience of the UNIDROIT Principles of International Commercial Contracts¹⁴³⁶ is a model for the SADC because it provides a wealth of experience on how two legal systems may be integrated or accommodated.

The search for uniform rules should consist of identifying common sets of principles and concepts as well as divergent principles to be evaluated in different ways in the various

¹⁴²⁷ Ch 6 paras 6.5 above.

¹⁴²⁸ Ibid. See arts 10 and 13 AEC Treaty.

¹⁴²⁹ Ibid.

¹⁴³⁰ Ibid.

¹⁴³¹ Ch 6 paras 6.4 above.

¹⁴³² Luwam 2010 *AJICL* 217.

¹⁴³³ The legal systems of the world are divided into three groups: the English-American common law Group originally championed by England, the Napoleonic group championed by France and the Romano-Germanic group originally championed by Germany with major contributions from the Netherlands, Australia and Switzerland; *Wood Principles of international insolvency* (2007) 55.

¹⁴³⁴ Ch 6 paras 6.3 above.

¹⁴³⁵ Smits "Mixed jurisdictions: Lessons for European harmonisation" 2008 *Electronic Journal of Comparative Law (EJCL)* 7.

¹⁴³⁶ Ch 7 paras 7.2.4 above.

national jurisdictions. Where coherence is unlikely, then some co-ordination is certainly needed. In this way, the mixed system will flourish with no bias to any of the legal systems. To ensure that the commercial laws are well received and not rejected, the harmonisation process should be given a community-based perspective.¹⁴³⁷ Accordingly, a working committee composed of the different stakeholders should be established.¹⁴³⁸ Civil society, academics, the private sector, and business persons must play an active role in the process,¹⁴³⁹ which includes pressurising governments to implement integration, and respect good governance and human rights. The SADC Treaty recognises this, and to this effect provides in Article 23 that:

- (1) In pursuance of the objectives of this Treaty, SADC shall seek to involve fully, the people of the Region and non-governmental organisations in the process of regional integration.
- (2) SADC shall co-operate with, and support the initiatives of the people of the Region and non-governmental organisations, contributing to the objectives of this Treaty in the areas of co-operation in order to foster closer relations among the communities, associations and people of the Region.

The committee should be entrusted with the task of investigating the feasibility of the project, carrying out a comprehensive comparative study on the subject, and presenting a draft document, which may be called “Comparative Commercial Law of Southern Africa” or the “SADC Comprehensive Commercial Law Report”. Interestingly enough, to this effect, a regional centre of studies on integration and SADC law was established at the Eduardo Mondlane University in Maputo, Mozambique. The document should be sent to a committee of experts from the region: senior civil servants, magistrates, lawyers, notaries, academics, and corporate representatives. The main task of the committee should be to draw up texts following the comprehensive report by the regional centre, taking into account the legal peculiarities of each legal system. Not only will such a legal norm gain importance in the future, it will also promote flexibility and bring together common law and civil principles, and hence will be widely acknowledged.

¹⁴³⁷ Cotterell *Law's community: Legal theory on sociological perspectives* (1996) 21, 307-308 and 313-314.

¹⁴³⁸ Ch 6 paras 6.4 above.

¹⁴³⁹ *Ibid.*

To promote institutional collaboration among SADC institutions, the committee of experts should work together with the SADC Secretariat in drafting the uniform rules and in the initiation of subjects for harmonisation. Once the texts have been drafted, they should be sent to the member states, the SNCs for comments, and to the Tribunal and the ICM for their advisory opinions, to verify whether the draft version is in accordance with the treaty and the general spirit of the SADC.¹⁴⁴⁰ The final date for submitting comments and opinions should be one month starting from the day the draft document was sent to them. This process is important for the member states and the Tribunal. While it gives the member states an opportunity to acquaint themselves with the new law, it gives the Tribunal the opportunity to understand the philosophy behind the laws that helps in rendering its judgments. At the close of the consultative period, the comments and the advisory opinions should be forwarded to the committee of experts. The committee should finalise the draft version, bearing in mind the observations/comments of the member states and opinions of the Tribunal and the ICM, and then forward the final copy to the Summit for adoption.

Research and training on the adopted laws are an important part in the adoption process as they contribute substantially to the understanding and dissemination of the laws. In this respect, once the laws have been adopted, they should be taught at the very first year of law school or any university in the region, as this will equip students, academics, legal professionals, and even politicians with a better understanding of the laws. Policy choices regarding the content of the commercial laws should be as follows:

8.2.1 *Company law regime*

The SADC's harmonisation of its company law rules should be done after careful vetting of the laws of the member states, like OHADA and the EU, SADC law makers and drafters should strive towards greater flexibility and freedom of choice in respect of company forms and the internal distribution of powers.¹⁴⁴¹ The one advantage of this is the fact that any person, irrespective of their nationality or capital, wishing to engage in a commercial activity in the form of a company in one of the contracting states is given

¹⁴⁴⁰ Ch 3 paras 3.2 above.

¹⁴⁴¹ Ch 3 paras 3.3.1.2 above.

the opportunity to do so, by choosing from the forms of company provided for by the Uniform Act.¹⁴⁴² The drafters should also strive towards greater freedom of establishment of the companies in the community. Rules regarding the formation of a company should be considered,¹⁴⁴³ and transparent reporting rules should also be considered in terms of which managers are expected to provide better information to shareholders regarding the company and its financial situation. This guarantees and reassures investors of their investments.¹⁴⁴⁴

The drafters should consider the corporate governance system that regulates the distribution of power in a company. In so doing, the drafters may choose between the one-tier system and the two-tier system or adopts the two-tier board option,¹⁴⁴⁵ with management either in the hands of the board of directors (*conseil d'administration*) presided over by a chairperson or a sole managing director (*administrateur général*) acting as CEO.¹⁴⁴⁶ Whether in the hands of the board or a managing director, there is no separation of the role of a chairperson from that of the CEO.¹⁴⁴⁷ These provisions add flexibility in the corporate form and in the interest of attracting foreign investment.¹⁴⁴⁸

8.2.2 Insolvency law framework

A modern insolvency system is widely acknowledged as a key foundation of sustainable economic development.¹⁴⁴⁹ In pursuance of the vision, it is vital for SADC law- and policy-makers to harmonise the insolvency laws of SADC member states. The insolvency framework should strive to balance the interests of the debtors and creditors. While it adequately and swiftly addresses the debtor's financial situation, it should at the same time protect the creditors' legitimate interests. In so doing, it is proposed that: The

¹⁴⁴² Ibid.

¹⁴⁴³ Rules regarding the formation of a company include the time required to form a company and the cost.

¹⁴⁴⁴ Ch 5 paras 5.3.3 above.

¹⁴⁴⁵ Ibid.

¹⁴⁴⁶ Ibid.

¹⁴⁴⁷ Ibid.

¹⁴⁴⁸ Ibid.

¹⁴⁴⁹ See WB Revised Principles and Guidelines for Effective Insolvency and Creditor Rights System (n 1172) above.

scope of application of the law should be clearly indicated. It is submitted that the scope of application should be limited to traders only (corporate insolvency). That is persons exercising trade as their profession excluding lawyers, accountants and civil servants; the criteria for opening of insolvency proceedings should also be considered. As is the case with OHADA, insolvency proceedings may be available only to debtors who are insolvent or in financial difficulties, and for solvent companies that anticipate imminent insolvency.¹⁴⁵⁰

An efficient and effective business rescue regime should be considered. Both the debtor and the court should be given an opportunity to institute business rescue proceedings.¹⁴⁵¹ In this regard, the time for discharge should be considered, that is it should be automatically granted immediately after the close of liquidation proceedings. Support programs should assist honest entrepreneurs. Another area in which harmonisation is needed is the capacity to institute insolvency proceedings against a debtor. Instead of resorting to individual enforcement action, collective insolvency proceedings may be instigated. A debtor, be it a natural or legal person with the status of a trader, should be empowered to commence insolvency proceedings, including a creditor's representative, or the courts.¹⁴⁵²

Time is of the essence in the resolution of insolvency. The first advantage of time-fixing is that: it fosters certainty, predictability and transparency for the debtor and his creditors.¹⁴⁵³ Secondly, it enhances the efficiency of the insolvency process, and avoids dissipation of assets.¹⁴⁵⁴ Thirdly, it assures creditors of their investments, and hence fosters a timely resolution of insolvency. For a timely, efficient, and impartial resolution of insolvency, it is proposed that the new dispensation should specify the time limit for resolving insolvency, because time is crucial in any recovery process. The time can be limited to 18 months, starting from the date of filing, for commencement of proceedings, or the date on which the debtor ceased paying its debts to the closure of

¹⁴⁵⁰ Ch 3 paras 3.3.2.1 above.

¹⁴⁵¹ Ch 6 sections 128-155 South African Companies Bill of 2008.

¹⁴⁵² See (n 1450) above.

¹⁴⁵³ Legislative Guide 59, paras 60.

¹⁴⁵⁴ Ibid.

proceedings.¹⁴⁵⁵ The law should also create the possibility for the extension of the time limit. The extension should be at the discretion of the judge based on the complexity of the case. With the above, the SADC will experience an improved position in the Doing Business Ranking.

It is also desirable for the insolvency law to specify the time period for insolvent debtors to file for commencement of proceedings. As is the case with OHADA, the time period should be limited to one month, starting from the date the debtor ceased paying its debts (cessation of payments), failing which the application should be rendered inadmissible,¹⁴⁵⁶ and the debtor (members of the board of directors) be held liable to creditors for any harm caused to them.¹⁴⁵⁷ These provisions are aimed at discouraging debtors from pursuing alternative solutions to their problems, such as voluntary restructuring negotiations.¹⁴⁵⁸ The new law should also specify the time for submission of claims for both domestic and foreign creditors. For a timely submission of claims, a deadline for submission should be specified (30 days for domestic creditors and 60 days for foreign creditors).¹⁴⁵⁹ This time factor will facilitate the verification and administration of claims processes, and will also help facilitate preparation of a list of creditors at an early stage of proceedings and “ensure that the claim process does not impose unnecessary delay on the proceedings which may operate to disadvantage foreign creditors”.¹⁴⁶⁰ A further provision should be added to the effect that submission of claims is only after the court’s decision to liquidate a debtor.

Policy choices regarding the debtors, their creditors, and other interests should be balanced. To guarantee continuity in business, debtors should be given the opportunity to make a fresh start (discharge), and to restructure potentially viable businesses. In addition, the law should guarantee certainty in capital markets so that lenders can make prudent lending choices, before, during, and after insolvency.¹⁴⁶¹ To this effect, the insolvency law should envisage the “creditor wealth maximisation vision” which sees

¹⁴⁵⁵ Ibid.

¹⁴⁵⁶ See (n 1452) above.

¹⁴⁵⁷ Legislative Guide 36 paras 50.

¹⁴⁵⁸ Ibid.

¹⁴⁵⁹ See (n 1452) above.

¹⁴⁶⁰ Legislative Guide 252, paras 13.

¹⁴⁶¹ Sarra “Widening the insolvency lens: The treatment of employees claims” 296.

insolvency as a process of collecting debts for creditors, and a response to the common problems faced by creditors.¹⁴⁶² This of course protects vulnerable creditors, and increases the willingness of financial institutions and other creditors to provide financing for business activities and the purchase of equipment.¹⁴⁶³ Avoidance provisions are equally protective of creditors and they should serve to prevent dissipation of assets by the debtor through the granting of preferential treatment and the entering of fraudulent transactions with intent to defraud the general body of creditors or delay payment.¹⁴⁶⁴

As for employees, they should be granted absolute priority for all outstanding claims over other creditors.¹⁴⁶⁵ Added to this, a mixture of both a guarantee fund mechanism and wage protection or “fund for compensation” should be developed for cases of closure or lay-off. This is with a view to providing employees with timely financial relief.¹⁴⁶⁶ As to its sources and management, the fund should be managed by a government representative and receive contributions from social security schemes, employees’ salaries and wages, and other state sources.¹⁴⁶⁷

Transfer of undertakings should not be a ground for dismissal, and where it occurs for economic, technical, or organisational reasons, employment contracts should pass from the previous employer to the new employer.¹⁴⁶⁸ This does not apply to transfer during bankruptcy proceedings instituted with the view to liquidate assets. As with the EU, when on the verge of termination of employment or collective dismissals, employers should first consult with workers representatives, with the goal of reaching an agreement.¹⁴⁶⁹ It is apparent from this discussion that there is no uniform rule applicable to cross-border insolvency disputes in the SADC. The benchmarks that have been set at the regional and international levels are those of OHADA and the EU at the regional levels, and the Legislative Guide and the World Bank Principles and Guidelines on

¹⁴⁶² See (n 1452) above.

¹⁴⁶³ Ibid.

¹⁴⁶⁴ Ibid.

¹⁴⁶⁵ Ibid.

¹⁴⁶⁶ Ch 3 paras 3.3.2.1 above..

¹⁴⁶⁷ Ch 7 paras 7.2.2.2 above.

¹⁴⁶⁸ Ibid.

¹⁴⁶⁹ Ibid.

Effective Insolvency and Creditors' Rights and the UNCITRAL Model Law at an international level.¹⁴⁷⁰

8.2.2 Labour regime

It is argued that the Charter will have no real impact on the shop floor and the life's of employees if the SADC does not give the Charter the force of national law and if there is no independent monitoring mechanism and a SADC tribunal to enforce decisions rendered on the subject matter.¹⁴⁷¹ To create a level playing field in terms of labour, it is highly desirable for the SADC to ratify and implement the core ILO Conventions¹⁴⁷² and the SADC Charter on Fundamental Social Rights (the Charter).¹⁴⁷³ The ratification of the charter will create common standards for all member states and will enable a prospective investor, when buying an undertaking as a going concern, to know of the workers' and creditors' rights in the event of employer insolvency. It will equally, facilitate free entry and establishment of humans and corporations.¹⁴⁷⁴ In addition, there must be a supervisory mechanism to ensure accountability on the part of the member states.

The survival of the uniform rules is aided by strong supranational institutions. A successful legal integration in the SADC region demands a structure that fosters and maintains the legal integration process. In this respect, the thesis argues that for a more integrationist legal framework within the SADC, the SADC structure must be improved to facilitate the achievement of the common commercial rules.¹⁴⁷⁵ At this point, two institutions are vital to the discourse, namely the Summit and the SADC Tribunal. The focus on these institutions is based on their importance in the SADC's legal integration process. The importance of the institutions is underscored by the fact that the Summit creates the rules that govern the SADC and the Tribunal has the responsibility of

¹⁴⁷⁰ Ibid, paras 7.2.1 above.

¹⁴⁷¹ Ch 5 paras 5.3.5 above.

¹⁴⁷² Seven core ILO conventions have been ratified by all member states of the SADC; see www.ilo.org; accessed 3 November 2013.

¹⁴⁷³ See (n 1472) above).

¹⁴⁷⁴ Ch 4 paras 4.4.3 above.

¹⁴⁷⁵ Leno 2012 *THRHR* 256 and 261.

interpreting the rules. The next part of this chapter presents the possible paths to the improvement of the Summit and Tribunal.

8.3 Probable paths to the Summit and Tribunals' improvement

8.3.1 *The Summit*

As earlier mentioned, the Summit is the supreme decision-making body of the SADC. In taking concrete actions, the rule of consensus should be relaxed in favour of majority rule. Rule of consensus signifies the unanimous consent of all states present, the implication of which is that a state cannot be bound by an obligation or decision taken without its consent. The one advantage is that it “allows member countries to circumvent certain difficulties and avoid the kind of open splits and conflicts that emerge when difficult issues are taken to a vote”;¹⁴⁷⁶ the disadvantage is that it is time consuming. As Dreyfus says, “By trying too hard to please everyone, we sometimes end up with decisions devoid of significant content”.¹⁴⁷⁷ This necessitates the need for a majority rule in the decision-making processes relating to the uniform rules in the region, in order to take integration and co-operation forward.

The OHADA Treaty contains a provision on the relationship between the Uniform Acts and national laws. As indicated in Article 10 of the OHADA Treaty, the Uniform Acts are binding and directly applicable in the member states.¹⁴⁷⁸ The SADC Treaty, like the EU Treaties, does not contain provisions on the relationship between community law and the national law of member states.¹⁴⁷⁹ The power of the Summit and the SADC Tribunal to take legally-binding measures, and the Tribunal to hear disputes relating to the interpretation, application, or validity of the Treaty or acts of SADC institutions, does not in any way mean that the member states have limited their sovereignty rights.¹⁴⁸⁰ Thus, it will be necessary for the SADC Treaty to have a provision relating to the binding and direct effect of the uniform commercial laws in the member states.¹⁴⁸¹

¹⁴⁷⁶ Dreyfus *Droit des relations internationales* (1987) 25.

¹⁴⁷⁷ *Ibid*, 228.

¹⁴⁷⁸ Ch 5 paras 5.3.2 above.

¹⁴⁷⁹ Arts 5 and 6 (4) SADC Treaty.

¹⁴⁸⁰ Zenda (n 980) 436.

¹⁴⁸¹ Ch 3 paras 3.3 above.

8.3.2 *The SADC Tribunal*

The value of the SADC Tribunal in the SADC's commercial law harmonisation or unification process cannot be over-emphasised. Like the CCJA, it would assist in the interpretation and application of the laws and settlement of conflicts relating to the laws. A decision was made by the summit to review the role, functions and terms of reference of the Tribunal.¹⁴⁸² In this regard, the WTIA was commissioned to do the review. After the company's study of the Tribunal, it came up with some propositions.¹⁴⁸³ Instead of accepting the WTIA's recommendations, the Tribunal was temporarily suspended. According to Fritz "the suspension of the Tribunal is a fatal blow to the rule of law in the region and to the obedience of member states to any supranational SADC values, institutions, and decisions".¹⁴⁸⁴ The Ministers of Justice/ Attorneys Generals were tasked by the SADC leaders to negotiate a new protocol on the Tribunal, the mandate of which will be confined to the interpretation of the SADC treaty and protocols relating to disputes between the member states.¹⁴⁸⁵

Ruppel suggested the strengthening of the mandate of the Tribunal, and the transfer of a certain amount of decision-making authority away from the member states.¹⁴⁸⁶ On a continent where there is high regard for power, it must be acknowledged that persuading African leaders to transfer decision-making power will not be an easy task. However, it is possible, if these leaders are sufficiently committed to seeing the goals of regionalism become reality. For Ndlovu,¹⁴⁸⁷ "one of the ways to improve the Tribunal's operations and facilitate trade and legal certainty in the region is to clothe the Tribunal with appellate status". This would be to redesign the Tribunal as a last resort court, or a

¹⁴⁸² The SADC Summit at a meeting in Kinshasa, DRC, directed the regional ministers of justice to "undertake a review of the operations of the Tribunal with the view of strengthening and improving its terms of reference"; see Ndlovu "SADC Tribunal review: Does the Tribunal require appellate Jurisdiction?" (2011, unpublished and on file with author) at 1 (hereinafter referred to as Ndlovu).

¹⁴⁸³ Ch 4 paras 4.2.8.2 above.

¹⁴⁸⁴ Fabricius (n 667) 9.

¹⁴⁸⁵ SADC summit 17-18 August 2013. The decision to negotiate a new protocol is following the final communiqué from the 32nd summit.

¹⁴⁸⁶ Ruppel "ECAS 2011 – 4th European Conference on African Studies Uppsala 15–18 June 2011: Panel 133: The Question of Land Ownership in Post-Colonial African Development" (<http://bit.ly/vge39r>; accessed 24 November 2011).

¹⁴⁸⁷ The SADC Summit at a meeting in Kinshasa, DRC, directed the regional ministers of justice to "undertake a review of the operations of the Tribunal with the view of strengthening and improving its terms of reference"; see Ndlovu (n 1482) above.

final Court of Appeal. The author agrees with Ndlovu, but the question is, what was the purpose of the SADC drafters? Was it simply to create a Tribunal for the regulation of SADC matters, or was it to create a Tribunal that would serve as a court of last resort? This of course requires a look at the SADC Treaty.

It is clear, particularly from the wording of Article 16 (1) of the SADC Treaty and Article 14 of the SADC Protocol on Tribunal Rules of Procedure that the SADC drafters intended to create an appellate body. Reliant on 32nd SADC Summit decision, the SADC drafters intend to create an appellate body reserved only for member states. It is submitted that the 32nd SADC Summit decision to reduce the Tribunal's jurisdiction is backward step compared to other regional courts, where access is open to individuals.¹⁴⁸⁸ To this extent, therefore, one could speak of the likely paths along which the Tribunal could be improved. Should the SADC drafters decide to improve the current Tribunal, they will need to take serious account of the following important points: Firstly, as is the case with other regional courts, the Tribunal's jurisdiction should be extended to include individual access especially with regards to human rights issues after exhaustion of local remedies. This is an important development for investors because it gives them the opportunity to submit disputes irrespective of the personality of their contractual party.

Secondly, like the CCJA, the Tribunal should be redesigned as an independent organ with compulsory status to hear business related matters.¹⁴⁸⁹ The Tribunal should have compulsory jurisdiction to which member states, individuals and legal persons are obliged to refer their business-related cases.¹⁴⁹⁰ The granting of compulsory jurisdiction is vital in order to ensure uniform interpretation and application of the business laws. This will give the Tribunal a stronger voice in shaping the rules emerging from the community and hence, will enhance the success of the SADC regional approach. This is

¹⁴⁸⁸ See ch 6 above.

¹⁴⁸⁹ Ch 3 paras 3.2.5 above.

¹⁴⁹⁰ Ibid.

coupled with mutual trust and respect for each member states' national judicial competence.¹⁴⁹¹

As a matter of necessity, the Tribunal's advisory opinions should be binding, and consequently, enforceable by the requesting parties. There is no way to achieve this other than by inserting a clause to this effect in the SADC treaty. As is the case with OHADA, national courts, member states, individuals, SADC organs and other organs that relate to the activities of the SADC¹⁴⁹² should be allowed to approach the Tribunal and to request an advisory opinion relating to the commercial laws, the SADC treaty and any subsidiary instruments.¹⁴⁹³ Ntumha notes that, "integration will not make much progress until community decisions are given direct force of law over businesses and individuals operating in the member states".¹⁴⁹⁴ Indeed, the decisions of the Tribunal by virtue of Article 24 (3) of the SADC Protocol on Tribunal Rules of Procedure are binding on the parties to the dispute, but practically, the decisions do not have an *erga omnes* effect. Therefore, in the light of Article 20 of OHADA Treaty, the decisions of the Tribunal should be mandatory in all respects, and directly binding not only on the parties to the dispute, but also on the member states and the community institutions.¹⁴⁹⁵ Furthermore, the decisions should have legal effect on "their own and automatically without any intervention on the part of national authorities, in the internal affairs of member states, and must be implemented within their territories".¹⁴⁹⁶

In order to facilitate the implementation of the Tribunal's decisions, the Tribunal should be empowered to follow up on the implementation of its decisions. This of course will require a change in the wording of Articles 33 (1) and (2) of the SADC Treaty to the effect that in the event of non-compliance, the Tribunal should be able to take appropriate sanctions against the defaulting state. Like the WTO, DSU and the ECJ, the Tribunal should be able to order a defaulting state to make payment for non-compliance

¹⁴⁹¹ Ch 4 paras 4.5 above.

¹⁴⁹² Ch 3 paras 3.2.5 above.

¹⁴⁹³ Ibid.

¹⁴⁹⁴ Ntumha "Institutional similarities and differences: ECOWAS, ECCAS and PTA" 313.

¹⁴⁹⁵ Ch 3 paras 3.2.5 above.

¹⁴⁹⁶ Ibid. See Ntumha (n 1494) above.

with its rulings.¹⁴⁹⁷ As indicated in the preceding chapter, the SADC Tribunal when interpreting or resolving disputes is given the opportunity to have regard to applicable principles of international law and the experience of other international courts.¹⁴⁹⁸ But neither the SADC Treaty nor the Tribunal Protocol specifies the method the Tribunal will use when interpreting the SADC law. In this respect, the ECJ approach is pertinent. In the case of the ECJ, we noted that it uses the purposive or teleological construction in terms of which interpretation is performed in light of the “objectives of the provision concerned rather than simply its language”.¹⁴⁹⁹ The ECJ approach emphasises the objectives or purposes of the Treaty. The same should apply to the SADC Tribunal, as this will help it to disregard other rules of interpretation, and apply the teleological method where necessary.¹⁵⁰⁰

Another aspect worth considering is the current composition of the Tribunal. Article 16 (3) of the SADC Treaty and Article 4 of the SADC Protocol on Tribunal Rules of Procedure provide for the appointment of judges. In terms of the provisions, ten judges are appointed for a period of five years, renewable with the accord of all member states. These judges are indeed intended to represent the community at large, but the problem that is likely to arise in the near future is that of unequal representation. This of course will be raised by member states that are not represented at the Tribunal. To overcome the problem of unequal representation, inspiration may be drawn from Article 56 of the OHADA Treaty, which provides for the appointment of ad hoc judges by countries not represented at the CCJA. Article 56 of the OHADA Treaty provides:

Any dispute that may arise between contracting states regarding the interpretation or the application of the present Treaty and which would not be settled amicably may be referred by a contracting state to the Common Court of Justice and Arbitration. If a judge of the nationality of one of the parties is sitting in the Court, any party may appoint an ad hoc judge to sit for the hearing of the case.¹⁵⁰¹

¹⁴⁹⁷ Ch 6 paras 6.3.2.4 above.

¹⁴⁹⁸ Ch 6 paras 6.5 above.

¹⁴⁹⁹ Ibid.

¹⁵⁰⁰ Ibid.

¹⁵⁰¹ Art 56 OHADA Treaty.

In the same vein, parties to a dispute should be given the opportunity to nominate a judge of their choice. This should be in favour of countries not represented at the Tribunal, with the aim of ensuring that all states have a say in the decision-making process. If the Tribunal is improved, there could be immense and far-reaching implications for investors and the SADC community. For the SADC, it will entail incorporation of a “compromissory clause” in which parties accept the Tribunal’s jurisdiction for any dispute relating to their business laws, the SADC Treaty and other subsidiary instruments.

To have successful legislation implemented, it is most useful for SADC states to recognise the importance of the project and to accept everything that contributes to this goal, including their full support.

8.4 The conditions for sound legal integration in the SADC

There are several views on the notion of sovereignty. In a judgment of the Permanent Court of International Justice,¹⁵⁰² the court defined sovereignty as, “the fundamental ability to commit under international law”. In *casu*, the court stated that, “the right of entering into international...engagements is an attribute of state sovereignty”.¹⁵⁰³ In other words, states must be prepared and willing to enter into agreement, and they must be bound by it. For Alvik, sovereignty is a “fundamental concept of international law, separate and distinct from its municipal law counterpart”.¹⁵⁰⁴ Issues of sovereignty are encountered when it comes to integration, and successful economic regional integration requires such concerns to be dealt with sensitively and effectively.¹⁵⁰⁵ Given its relevance and its place in such a project, SADC member states should be prepared to cede part of their sovereignty to the SADC because it is important for regional

¹⁵⁰² See Wimbledon, 1923 PCIJ No. 1, 22. See also Brown BS 2004 The case of the S.S. Wimbledon 1923 Permanent Court of International Justice (ser.A) 1 (Brief summary excerpt) at: http://www.kentlaw.edu/faculty/bbrown/classes/IntLawFall2007/CourseDocs/Case_OF_TH_SS_WIM_BLEDON.doc; accessed 15 December 2011.

¹⁵⁰³ Alvik *Contracting with sovereignty: State contracts and international arbitration* (2011) 241.

¹⁵⁰⁴ *Ibid*, 240.

¹⁵⁰⁵ See Ruppel O 2011 ECAS 2011 – 4th European Conference on African Studies Uppsala 15-18 June 2011: Panel 133: The Question of Land Ownership in Post-Colonial African Development <http://www.nai.uu.se/ecas-4/panels/121-140/panel-133/Oliver-Ruppel-full-paper.pdf>; accessed 24 November 2011).

integration. To do so, the constitutions of the member states must provide, in express terms, for their governments being able to transfer sovereign powers to the SADC.¹⁵⁰⁶

Allan writes, “political will is a crucial ingredient in the integration process, [without which there will be little progress]”.¹⁵⁰⁷ As Ruppel rightly pointed out, “without political will and good faith on the part of ...states to meet and comply with their obligations as spelt out in ratified treaties and conventions, economic regional integration is likely to remain a concept on paper”.¹⁵⁰⁸ Therefore, there must be political will on the part of SADC leaders to adhere to the objectives of the SADC Treaty and the unified legislation. In addition, there should be enough human and material resources to assist member countries where necessary in the implementation of regional objectives. Given that the EU has demonstrated positive attitudes towards this end,¹⁵⁰⁹ support can be sought from it as well as from development financial institutions such as the World Bank.¹⁵¹⁰

Furthermore, there is also the need for a champion that is a country to chair the whole process, and such country should be one of high calibre that commands respect in the community. Within the context of a group of countries, it should be a country that is peaceful and stable, with the resources and financial stability both regionally and internationally. South Africa could lead the process because it possesses the economic and financial authority to assume a leadership role and to take the community forward, and it has the expertise and technology needed for such a process. It would be to its own advantage, especially in resolving the high immigration into the country.¹⁵¹¹ More so, the success of legal integration will depend on the quality of persons elected to serve in the institutions. Persons with the required qualifications and expertise should be appointed.

¹⁵⁰⁶ Sarooshi (n 678) above.

¹⁵⁰⁷ Allan (n 1053) 8.

¹⁵⁰⁸ Ruppel (n 812) above.

¹⁵⁰⁹ See the EU Green Paper on Development Cooperation 1997.

¹⁵¹⁰ Lavergne and Daddieh “Donor perspectives” in *Regional integration and cooperation in West Africa: a Multidimensional perspective* (1997) 103-130.

¹⁵¹¹ Although many may disagree on the choice of South Africa, the author submits that South Africa stands a better chance given its economic position and financial authority in the community.

To guard against the lack of accountability and transparency that breeds corruption, the appointed persons must be required to act in accordance with the rule of law. It must be remembered that the absence of rule of law is detrimental to an economy, not only does it create legal uncertainty about the operation of the law, but it also dries up investment in the sense that investors will not know how the law operates and how to plan around its requirements.¹⁵¹² Therefore, for a region that seeks to attract foreign investment in order to create much-needed economic growth and new development, its legal systems must be based on rule of law that is transparent and accessible, and also on an independent and non-corrupt judiciary.¹⁵¹³

8.5 Conclusion

This thesis demonstrated the existence of diverse laws in Africa and revealed that this diversity is a major obstacle to Africa's trade and investment and hence economic development.¹⁵¹⁴ In overcoming the challenges to Africa's development, African states have concluded several regional agreements. In examining the different regional bodies,¹⁵¹⁵ the thesis revealed that no part of the African continent has witnessed regional legal reform on the scale of that initiated by OHADA.¹⁵¹⁶ OHADA has created a stable business environment conducive for investors to conduct business in the region.¹⁵¹⁷ It has equally established supranational institutions that best serve the purpose of the organisation.

Even though OHADA provides practical examples for the development of uniform rules in Africa, the thesis further argued OHADA cannot serve as a possible model for SADC due to a number of reasons as discussed in chapter 5. To complement the work of OHADA, other regional schemes in and outside Africa were discussed, with the aim of drawing and adapting useful lessons for the SADC.¹⁵¹⁸ Some international instruments

¹⁵¹² Waldron 2009
http://www.law.nyu.edu/ecm_div3/groups/public/@nyu_law_websites_publications_law_school_magazine/documents/documents.e_cm_pro_062889.pdf at 72.

¹⁵¹³ Ibid.

¹⁵¹⁴ Ch 1 above.

¹⁵¹⁵ Ch 6 above.

¹⁵¹⁶ Ibid.

¹⁵¹⁷ Ch 2 above.

¹⁵¹⁸ Ch 6 paras 6.5 above.

were also discussed with the aim of providing the SADC with an idea of how uniform commercial law rules are developed.¹⁵¹⁹ The international instruments discussed would help the SADC to harmonise conflict of laws regarding which law and court should assume international jurisdiction to open insolvency proceedings and employment disputes.¹⁵²⁰

Clearly, the settlement of cross-border disputes presents no difficulty for OHADA contracting states. SADC states are therefore urged to enact uniform commercial law provisions. There is no doubt that this would come at some cost, but efforts must continue until the objective is achieved. SADC leaders and their collaborators (academics, business persons, and students) have the responsibility to pursue such integration. Briefly, it would be both practical and good administrative practice to have one set of company, insolvency, and labour laws in the SADC region that would do away with legal uncertainty and ambiguity in cross-border commercial transactions among SADC states. It is hoped that the SADC will rise to the challenge and engage with all of the above issues.

¹⁵¹⁹ Ch 7 above.

¹⁵²⁰ Ibid, paras 7.3 above.

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